

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Avenue, Room 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

81



FILE: WAC 07 130 53205 Office: CALIFORNIA SERVICE CENTER Date: JUL 03 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 dismissed a subsequent motion. 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 start-up post production supervision and film editing company, with no claimed employees, that seeks to employ the beneficiary as a marketing manager. The petitioner, therefore, 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 director denied the petition on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director abused his discretion in denying the petition.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 its March 22, 2007 letter of support, the petitioner stated that, as its marketing manager, the beneficiary would research opportunities for the company; negotiate agreements with film production companies and distributors; promote the activities of the petitioner and its parent company in the United States; develop strategic alliances with companies in the United States and Spain; research the United States market to explore ways for the petitioner to expand its business; help to create and edit promotional elements (such as commercials, trailers, and teasers) for both American companies and the petitioner’s parent company; work as a marketing and advertising consultant for audiovisual products; research film markets in the United States and find possible movies that can be distributed in Europe; and find possible production companies that can work with the petitioner’s parent company.

In her June 20, 2007 response to the director’s request for additional evidence, counsel re-named the petitioner’s proposed position. While the proposed position had originally been for a marketing manager, counsel now began referring to the proposed position as the petitioner’s Director of Marketing. Counsel also provided additional details regarding the duties of the proposed position, as requested by the director. However, the purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its 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). The AAO, therefore, will continue referring to the proposed position as that of a marketing manager, as that was the name of the position at the time the petition was filed, and the position for which the Department of Labor certified the labor condition application.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The director found the duties of the proposed position similar to those of a marketing manager, as that position is described in the *Handbook*. The AAO agrees. The 2008-2009 edition of the *Handbook*, in its discussion of the duties of advertising, marketing, promotions, public relations, and sales managers states the following, at page 30:

Marketing managers develop the firm's marketing strategy in detail. 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—for example, business firms, wholesalers, retailers, government, or the general public. 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 they 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. . . .

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 demonstration 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 for classification as specialty occupations under the first criterion.

Moreover, employers that do require a bachelor's degree do not require that it be in any particular field of study. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by

section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As noted previously, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree in a specific specialty that is directly related to the proposed position. Simply requiring a baccalaureate degree or its equivalent is not sufficient; the degree must be in a specific field of study that is directly related to the position.

For all of these reasons, 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)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

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 counsel in response to the director's request for additional evidence and on appeal. Counsel, however, has 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 petitioner has not submitted any evidence to demonstrate that any of these job postings are from companies "similar" to the petitioner, a start-up post production supervision and film editing company with no employees. There is no evidence 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

IBM is an information technology company. Its Software Group alone, which placed the job postings, has 40,000 employees. The Long Beach Memorial Medical Center and the Miller's Children's Hospital are health services providers.

While NBC Universal, ABC, Thomson Grass Valley, Starz Home Entertainment, the Nielson Company, the Marketing Resource Center, and the Kwikset Corporation operate in the same general business setting as the petitioner, there is no indication that the petitioner is similar to any of these companies in size, scope, and scale of operations, business efforts, and expenditures. Again, 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* at 165. The director noted this in her denial, stating that “the job listings are from employers [that] appear to be dissimilar to the petitioner’s organization.”

On appeal, counsel asserts that although the petitioner is a small, start-up company, “its needs are no different than the larger, more established companies in the same field.” However, counsel has misunderstood this basis of the director’s decision. Under the first prong of the second criterion, the petitioner must establish that the degree requirement is common in parallel positions among similar organizations. The issue is whether those companies are “similar” to the petitioner. As set forth above, the petitioner has failed to establish that it is similar to the companies from which it submitted job postings.

Further, the AAO notes that not all of these job postings require a bachelor’s degree, or its equivalent. For example, Thomson Grass Valley would accept five years of experience in lieu of a degree. Of the companies that do require a bachelor’s degree, many do not require that it be in any particular field of study. For example, the Nielson Company, the Marketing Resource Center, and Kwikset would find acceptable candidates with a range of degrees. Again, when a range of degrees can perform the duties of a position, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor’s or higher degree in a specialized field of study. As noted previously, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree in a specific specialty that is directly related to the proposed position.

Moreover, the job postings are too few to establish an industry-wide standard. Also, 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, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is similar to the marketing manager position described in the *Handbook*, which does not require a degree in a specific field of study.

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

Nor does the proposed position 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 proposed position. To determine the 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. However, the petitioner is a start-up company which has never before hired a marketing manager, so it cannot

demonstrate a hiring history of normally requiring a bachelor's degree, or its equivalent, for the position. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to have a higher degree of knowledge and skill than that normally expected of marketing managers in other, similar organizations. Therefore, the duties 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 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).

Finally, the AAO turns to the letters submitted by counsel in support of the petition. Counsel submits as expert testimony letters from the following individuals: (1) Carl Obermiller, Professor of Marketing and Marketing Department Chair at Seattle University; (2) Maggie Zulovic, Executive Producer at Module Zero Media; (3) Keijiroh Ishikawa, Marketing Manager at GAGA America, Inc.; (4) Pio Vernis, marketing director at Working at Weekend SCP; (5) Ricardo Gil, General Manager at Ricardo Gil & Associates, SCP; and (6) Debra Nason, Executive Vice President of Arenas.

Ms. Zulovic, Mr. Ishiwaka, Mr. Vernis, and Mr. Gil state the following:

I have been asked to render an opinion regarding whether it is common in the industry to employ marketing managers or directors who have a university degree. I can state that it's common to hire staff for the Marketing Manager position with a degree based education [sic].

* * *

The importance of the degree requirement is essential due to the duties that the Marketing Manager or director position demands. . .

Ms. Nason's letter is similar.

In his letter, Professor Obermiller states the following:

The position is fairly characterized by the title, Director of Marketing,¹ and qualifies as a specialty occupation as a marketing manager. The specific knowledge and skills necessary for marketing management are normally associated with the achievement of at least a bachelor's degree in marketing or a related field . . .

¹ As noted previously, counsel only began referring to the proposed position as "Director of Marketing" after the director issued her request for additional evidence. As the petitioner filed a labor condition application and obtained certification for the position of marketing manager, the amendment is not accepted.

These letters satisfy none of the aforementioned criteria, and do not establish the proposed position as a specialty occupation. The AAO finds that an inadequate factual foundation to support any of the authors' opinions has been established. None of the authors note the location of the petitioner, nor indicate whether they reviewed company information about the petitioner, visited its site, or interviewed anyone affiliated with the petitioner. Nor do they describe the duties of the proposed position in meaningful detail. The extent of their knowledge of the proposed position has, therefore, not been established. Thus, the petitioner has not established the reliability and accuracy of their pronouncements and these submissions are therefore not probative of any of the specialty occupation criteria. That the letters of Ms. Zulovic, Mr. Ishiwaka, Mr. Vernis, Mr. Gil, and Ms. Nason are virtually identical raises the question as to who actually wrote them, and diminishes their value as evidence.²

Regarding Dr. Obermiller's letter, counsel states the following:

Dr. Obermiller based his opinion not only on his review of the record and his many years of experience in the field, but also on his own search of a professional association in the field (the American Marketing Association).³ As an expert who has researched the issue, the USCIS should accept Dr. Obermiller's opinion.

Again, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. When a range of degrees can perform the duties of a position, the position does not qualify as a specialty occupation. *See Matter of Michael Hertz Associates* at 558. To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Dr. Obermiller has not established that performance of the duties of the proposed position requires a baccalaureate degree or equivalent in a specific field of study. He has provided no documentary evidence to support his assertion that the proposed position requires a degree in marketing or a related field, which contradicts the industry-wide data contained in the *Handbook*. 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)).

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Accordingly, these letters satisfy none of the aforementioned criteria, and do not establish the proposed position as a specialty occupation.

² Even if the reliability of the letters from Ms. Zulovic, Mr. Ishiwaka, Mr. Vernis, Mr. Gil, and Ms. Nason were not suspect, the AAO notes that they do not state that a degree in a specific field is required to perform the duties of a marketing manager.

³ The AAO has also looked to the website of the American Marketing Association. Information contained at that site indicates that a person with a range of degrees can perform the duties of a marketing manager. For example, in its "Ask the Expert" section, the website offers advice to an individual seeking entry into the field who does not have a degree in marketing. *See* <http://www.marketingpower.com/Careers/Pages/BreakintoMarketingwithoutaMarketingDegree.aspx#> (accessed June 18, 2008).

The proposed position does not qualify 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). Accordingly, the AAO will not disturb the director's denial of the petition.

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.