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U.S. Citizenship
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Services

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FILE: WAC 07 131 53391 Office: CALIFORNIA SERVICE CENTER Date: JUN 0 2 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.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates four retail and wholesale fabric stores and has been in operation since 1992. It claims to have had 38 employees and to have earned a gross annual income of \$6,864,158 at the time the petition was filed. It seeks to employ the beneficiary as a marketing manager. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's April 14, 2007 request for further evidence (RFE); (3) documentation submitted in response to the director's RFE; (4) the director's May 24, 2007 denial decision; and (5) counsel's Form I-290B, brief, and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before rendering its decision.

On May 24, 2007, the director denied the petition upon determining that the proffered position was not degree specific and thus was not a specialty occupation. The director also determined that the beneficiary's University of Hawaii Bachelor's of Science degree in the field of Travel Industry Management did not include major coursework in the field of marketing or market research. On appeal, counsel for the petitioner asserts that the director erred when concluding that a degree requirement was not common in the industry for the proffered position and incorrectly determined that the beneficiary's degree was not parallel to a marketing position.

The first issue in this matter is whether the petitioner has established that the proffered position is a specialty occupation. To qualify as a specialty occupation, the AAO looks to the following pertinent regulations. 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.

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 petitioner stated in its March 28, 2007 letter in support of the position that the beneficiary in the position of its sales and marketing manager would perform the following duties:

He will direct the sales and marketing to the Korean, Japanese, European and mainland United States tourist market. His duties will include establishing programs to market our products to Korean and Japanese tourists. He will also train and supervise sales staff in these areas. He will be responsible for generating program and sales reports to be presented to our board of directors.

In response to the director's RFE, the petitioner elaborated on the previous job description and described the duties and responsibilities as follows:

Establish, develop and direct the strategy for marketing the firm's fabric products to markets in the remaining 49 states of the United States and overseas foreign markets. Direct market research to estimate the demand for our products and services and identify new potential markets to Korean and Japanese tourists. Develop pricing strategy in appropriate areas to

maximum profits and market share. Monitor trends that might indicate new products or services to be performed by our company. Consult with sales, promotion and advertising managers on product promotion and sales. Train marketing and sales staff.

The petitioner also provided a list of its employees submitted to the State of Hawaii in its State Unemployment Report for each quarter of the 2006 year.

As observed above, the director denied the petition on May 24, 2007. The director referenced the Department of Labor's 2006-2007 *Occupational Outlook Handbook (Handbook)* report that a wide range of educational backgrounds would be suitable for entry into advertising, marketing, promotions, public relation, and sales managerial jobs; thus the *Handbook* did not indicate that a bachelor's degree in a specific discipline as the normal minimum for entry into the occupation. The director also noted the petitioner had not submitted evidence to establish that a degree requirement is common to the petitioner's industry and had not submitted documentation showing that the proffered position involved either unique or complex duties that could only be performed by an individual with a degree in a specific specialty. The director further observed that the petitioner had not provided evidence that it had previously required the individual in the proffered position to have a bachelor's or higher degree in a specific specialty. The director also determined that the record did not contain evidence demonstrating that the duties of the proffered position were specialized and complex. The director concluded that the evidence in the record was insufficient to show that the job offered could not be performed by an experienced individual whose educational training fell short of a baccalaureate degree or a degree in a specialty unrelated to the specific duties of the position.

On appeal, counsel for the petitioner asserts that the proper meaning of the *Handbook's* report on the occupation of a marketing manager is that employers require a bachelor or masters degree but prefer a degree in business administration with an emphasis on marketing. Counsel notes that the *Handbook* indicates that marketing managers develop the firm's marketing strategy with the help of subordinates including product development managers and market research managers and that an individual in a marketing research analyst position requires the minimum of a bachelor's degree. Counsel contends that if subordinate positions require a bachelor's degree then the superior position would also require a bachelor's degree. Counsel, citing *Unical Aviations Inc. vs USINS*, 248 F. Supp. 2d, 931, asserts that the industry prefers a degree majoring in marketing but accepts degrees in other majors. Counsel contends that failing to adhere to the cited case appears to violate Service regulations.

Counsel's assertions are not persuasive. The AAO will first consider the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations.

The 2008-2009 *Handbook* under the section titled Advertising, Marketing, Promotions, Public Relations, and Sales Managers, states the following with regard to the employment of marketing managers:

Marketing managers. Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research*

*managers,*¹ 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.

* * *

Sales managers. Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives.

Regarding the educational requirements for marketing and sales managers, the 2008-2009 *Handbook* reports:

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, management, economics, accounting, finance, mathematics, and statistics are advantageous. Additionally, the completion of an internship while the candidate is in school is highly recommended.

* * *

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.

¹ Counsel's assertion that a marketing manager's subordinates require bachelor's degrees is noted. However, counsel uses the occupation of a market research manager interchangeably with that of a market research analyst. Regarding the occupation of a market research analyst, the *Handbook* reports that the individuals in this occupation gather statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze statistical data on past sales to predict future sales, as well as devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction. The *Handbook* does not report that this position, although requiring analytical skills and a bachelor's degree, requires a bachelor's degree in a specific discipline. The *Handbook* does not reflect that the degrees held by candidates must be in a field directly related to market research as required for classification as a specialty occupation. See the 2008-2009 *Handbook* section on Market and Survey Researchers.

The *Handbook's* report that some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing followed by an indication that "[m]ost advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel" is a clear indication that there are a variety of avenues available to employment in this occupation. The AAO does not concur with the counsel's assertion that the *Handbook* reports that employers require a bachelor's or master's degree for the occupation of a marketing manager and prefer a degree in business administration with an emphasis on marketing; however, even if the AAO accepted counsel's assertion a preference for a degree in a specific discipline does not establish a position as a specialty occupation. Employer preference is not synonymous with the "normally required" language of the criterion. The *Handbook* clearly indicates there is no degree requirement or degree specific requirement for the occupation of marketing manager. Accordingly, the title of marketing manager does not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO next turns to the second criterion, whether a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the petitioner's particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). The petitioner in this matter has not provided letters or job advertisements or affidavits from firms or individuals in the petitioner's industry to establish that a bachelor's degree in a specific discipline is a common requirement for positions parallel to the proffered position. As determined above, the *Handbook* does not report that a degree is required for the occupation of marketing manager. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner's description of the beneficiary's duties lacks the specificity and detail necessary to establish that its particular position is complex or unique. The petitioner has offered a generic description of the beneficiary's duties, one that appears to describe the occupation of a marketing manager rather than that of a specific position. The petitioner borrows from the *Handbook's* descriptions of the occupation of a marketing manager in an effort to establish that the beneficiary would perform this work. However, a petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a marketing manager develops the firm's marketing strategy in detail, develops pricing strategy, estimates the demand for products and services offered by the firm and its competitors, and monitors trends that indicate the need for new products and services. Neither can the petitioner establish its employment as a specialty occupation by making conclusory statements regarding the position, rather than defining the activities associated with the position, for example, describing how the beneficiary develops the marketing strategy or estimates the demand for products or monitors trends. 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)). A generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in relation to its particular business interests. The petitioner's general description of an occupation is insufficient to demonstrate that its particular position is so complex or unique that only an individual with a degree can perform the work associated with the position. The petitioner has not distinguished the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not offered evidence demonstrating that it previously employed an individual in the proffered position. The AAO usually 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. In this matter, as the petitioner has not presented such evidence the proffered position has not been established as a specialty occupation under the third criterion. Moreover, the petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the petitioner has not established the proffered position as a specialty occupation under the requirements 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), whether the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. As observed above, the record does not contain a meaningful description of the duties of the proffered position; thus the petitioner cannot point to any particular generally described element of the description and contend that the position is so complex and specialized that it must be considered a specialty occupation.

In this matter for instance, the petitioner indicates the beneficiary will: "[e]stablish, develop and direct the strategy for marketing the firm's fabric products to markets in the remaining 49 states of the United States and overseas foreign markets;" "[d]irect market research to estimate the demand for our products and services and identify new potential markets to Korean and Japanese tourists;" "[d]evelop pricing strategy in appropriate areas to maximum profits and market share;" and "[m]onitor trends that might indicate new products or services to be performed by our company." These are generic duties outlined in the *Handbook*. They offer no insight into the daily duties of the proffered position as those duties relate to the petitioner's operation of retail

and wholesale fabric stores. The record does not provide any evidence that the proffered position encompasses duties that are complex and specialized in regard to the petitioner's business. Without such evidence, the petitioner has not established the criterion 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 is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The next issue in this matter is whether the petitioner established the beneficiary's eligibility to perform the duties of a specialty occupation. The director determined that the beneficiary's University of Hawaii Bachelor's of Science degree in the field of Travel Industry Management did not include major coursework in the field of marketing or market research; and thus the beneficiary's degree was insufficiently related to the occupation to qualify the beneficiary to perform the occupation. Counsel asserts that a degree in travel industry management is parallel to a degree in marketing as both degrees require courses in marketing, public relations, advertising, and pricing. The AAO finds that the beneficiary's travel industry degree may qualify him to perform the duties of the proffered position, but that the position does not incorporate the duties of a specialty occupation. As determined above, as the position is not a specialty occupation, the petition may not be approved.

The petition will be denied and the appeal dismissed for the above stated reason. 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.