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U.S. Department of Justice
Immigration and Naturalization Service

**Identifying data deleted to
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invasion of personal privacy**

[REDACTED]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: SRC-01-209-52630 Office: Texas Service Center

Date: **DEC 10 2002**

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)

IN BEHALF OF PETITIONER:
[REDACTED]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an international freight forwarder with two employees and a stated gross annual income of \$150,000. It seeks to employ the beneficiary as its marketing director for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel indicated that a brief and/or additional evidence would be submitted in support of the appeal on or before March 3, 2002. To date, no brief or additional evidence has been received by this office. Therefore, the record must be considered complete.

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.

Pursuant to 8 C.F.R. 214.2(h)(4)(ii), a "specialty occupation" is defined 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.

The director denied the petition because the petitioner failed to establish that a bachelor's degree in a specific specialty is normally the minimum requirement for entry into the occupation or that the duties of the job are so specialized and complex that they can only be performed by an individual with a baccalaureate degree in a specific specialty.

On appeal, counsel argues that the Service has previously found the occupation of marketing director to be a specialty occupation. In support of his argument, counsel cites several unpublished decisions by the Administrative Appeals Unit. Counsel also cites American Biotech, Inc. v. INS, F. Supp. (E.D. Tenn. March 27, 1989).

The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- supervise the development and implementation of marketing plans which will leverage current service strengths and opportunities in the market;
- participate in the development and supervision and implementation of marketing strategies and programs to achieve sales and profit objectives for assigned services;
- supervise the development and production of appropriate advertising and promotional materials in accordance with established budgetary and quality standards;
- evaluate marketing programs against established performance objectives[.]

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.

In these proceedings, the duties of the position are dispositive and not the job title. The offered position parallels that of a marketing manager as that job is described by the Department of Labor (DOL) in its Occupational Outlook Handbook (Handbook), 2002-2003 edition. A review of the Handbook at page 28 finds no requirement of a baccalaureate degree in a specific specialty for employment as a marketing manager. A wide range of educational backgrounds are suitable for entry into marketing managerial positions. Many employers prefer degrees in business administration, but bachelor's degrees in various liberal arts fields are also acceptable.

Counsel states that the position has previously been held by two individuals who have bachelor's degrees in business administration and economics, respectively. Although the petitioner's past hiring practices suggest that it prefers to hire individuals with a bachelor's degree for the offered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Service 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the petitioner states that it has only hired individuals with a baccalaureate degree in business administration or a related field, the position, nevertheless, does not meet the

¹ The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

statutory definition of a specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge.

Additionally, the petitioner has not submitted any evidence to show that the degree requirement is common to the industry in parallel positions among similar organizations.

Counsel argues that the proffered position can be considered professional based on the complexity of its duties alone. Counsel cites the holding reached in American Biotech, Inc. v. INS, F. Supp. (E.D. Tenn. March 27, 1989) in support of his argument. However, American Biotech, id., dealt with membership in the professions, not with membership in a specialty occupation. While these terms are similar, they are not synonymous. The term "specialty occupation" is specifically defined in section 214(i) of the Act. That statutory language effectively supersedes the cited decision. Thus, the petitioner has not shown that the specific duties of the position are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

With respect to counsel's objection to the denial of this petition in view of the approval of similar petitions in the past, the Service is not required to approve petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the previously approved petitions and their supporting documentation. It is, therefore, not possible to determine definitively whether they were approved in error or whether the facts and conditions have changed since those approvals. Determinations of eligibility are based on the totality of evidence available to the Service at this time.

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.