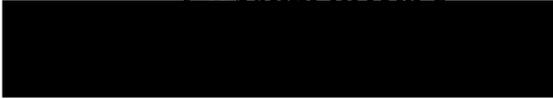




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U.S. Department of Justice
Immigration and Naturalization Service

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



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

File: EAC-97-122-52137 Office: Vermont Service Center Date: **SEP 25 2002**

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)

IN BEHALF OF PETITIONER:



DUPLICATE 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal and on a subsequent motion to reopen. The matter is now before the Associate Commissioner for Examinations on a second motion to reopen and reconsider. The motion will be granted. The previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a distributor of store fixtures with two employees and a gross annual income of \$419,550. It wishes to employ the beneficiary as director of marketing and graphic design. The director determined the petitioner had not established that the beneficiary qualifies to perform services in a specialty occupation.

On appeal, counsel provided a third evaluation of the beneficiary's education in combination with her work experience in the marketing field. On February 12, 1998, the Associate Commissioner dismissed the appeal reasoning that the petitioner had not demonstrated that the beneficiary had the equivalent of a baccalaureate degree in a specialized area. The Associate Commissioner further determined that the offered position is not a specialty occupation.

On first motion, counsel asserted that the offered position is a specialty occupation and submitted additional documentation in support of his assertion. The Associate Commissioner affirmed the prior order of February 12, 1998.

On second motion, counsel asserts that the beneficiary has the equivalent of a bachelor's degree in business administration with a specialization in advertising and promotion. In support of his assertion, counsel submits a new evaluation of the beneficiary's credentials. Counsel further asserts that the proffered position is a specialty occupation which requires the services of an individual with a bachelor's degree in business administration with an emphasis in marketing and graphic design. In support of his assertion, counsel submits a "position evaluation." (The petitioner had previously submitted another "position evaluation" in support of the first motion.)

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.

Section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(1), sets forth the following requirements to demonstrate that the beneficiary of an H-1B visa petition qualifies to perform services in a specialty occupation:

- (A) Full state licensure to practice in the occupation, if such licensure is required to practice in the occupation;
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

8 C.F.R. 214.2(h)(4)(ii) further defines the term "specialty occupation" 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 Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The Service considers the specific duties of the offered position combined with the nature of the petitioning entity's business operations. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Direct all related marketing activities and prepare all graphic design materials (including proposals, advertising and/or promotional information, brochures, catalogs, logos, etc.) for English and/or Spanish presentations assisted by computerized visual arts/communications created in house.

Perform sales/marketing of diverse lines of store fixtures and flooring products, merchandising services and track retail fixture industry trend.

Utilize Macintosh, Software-Adobe Photoshop and Quark for producing visual arts, all copy writing and illustrating design/layouts.

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.

The petitioner's President, Sandra J. Leppert, describes the company as a Florida corporation that specializes in the planning and renovation of retail space and serves as a distributor for multiple product lines of in-store fixtures and accessories. Ms. Leppert states that her company is presently targeting expansion of its services and product lines into the Latin American/Spanish speaking markets. The petitioner wishes to hire the beneficiary as director of marketing and graphic design. Ms. Leppert states that, since her company is a small business, it needs an individual who can proficiently direct its sales/marketing efforts as well as create applicable supporting advertising materials using computer design software.

The proffered position appears to combine the duties of a graphic designer with those of a marketing manager. According to the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 27:

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.

A review of the Department of Labor's Occupational Outlook Handbook, 2002-2003 edition, at page 38 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are 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. Thus, the petitioner has not shown that a baccalaureate degree in a specific field of study is a minimum requirement for the performance of the marketing duties of the offered position.

The DOL describes the work of a graphic designer at page 121 of the Handbook as follows:

Graphic designers use a variety of print, electronic, and film media to create designs that meet clients' commercial needs. Using computer software, they develop the overall layout and design of magazines, newspapers, journals, corporate reports, and other publications. They also may produce promotional displays and marketing brochures for products and services, design distinctive company logos for products and business, and develop signs and signage systems.

A review of the Handbook at page 122 finds that a bachelor's degree is required for most entry-level graphic design positions. The petitioner is a small business that seeks to have the same individual perform marketing and graphic design duties. Based on the graphic design duties of the offered position, it is concluded that the offered position is a specialty occupation. The petitioner has overcome that portion of the director's objection.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(1), equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(D)(5), the Service may determine that equivalence to completion of a baccalaureate degree in a specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition for expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or

subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record shows that the beneficiary received an Academic Honorary Degree of Professional Technician in Advertising and Communication in March of 1990 from the Academy of Professional Drafting (La Academia de Dibujo Profesional) in Colombia.

The record further shows that the beneficiary worked for Valencia & Soto, Ltd. from 1982 to 1984. The record contains an employment letter from an official of Valencia & Soto who states that, during her employment for that company, the beneficiary "conducted market research and projections for product growth and development, marketing for sales of mass consumption products, use of Macintosh software to produce designs, art, and illustrations."

From 1985 to 1990, the beneficiary attended the Academy of Professional Design.

From 1989 to 1991, the beneficiary worked for Centrum, Ogilvy & Mather. The record contains an employment letter from an official of Centrum, Ogilvy and Mather who states that, during her employment for that company, the beneficiary's duties included: "conducting market research, and projections of product consumption, growth and development; art designs and illustrations using Macintosh software; sales marketing for mass consumption products."

From 1991 to 1992, the beneficiary served as the Director of the Advertising Department for Armony Records. The record contains an employment letter from an official of Armony Records who states that, during her employment for that company, the beneficiary served as Director of the Publicity Department. She created catalogs, logos, product images, arts, and program design.

From 1993 to 1994, the beneficiary worked for Colgate Palmolive. No evidence has been submitted to document the beneficiary's employment for that company.

From 1994 to 1996, the beneficiary worked for Casa Velasco, a family business. The record contains an employment letter from an official of Velasco and Sons who states that, during her employment for that company, the beneficiary "designed the new image of the corporation, handled direct mail, supervised completed projects, and marketed new decorative lines."

Freda Clement-Willis, a credentials evaluator for Josef Silny & Associates, Inc., International Education Consultants, found the beneficiary's foreign education to be equivalent to 73.5 semester credit hours of undergraduate study in Advertising Design and Communication at a regionally accredited institution of higher education in the United States. Ms. Clement-Willis indicated that she based her conclusion on the beneficiary's diploma and transcripts.

The record contains three additional evaluations of the beneficiary's education and work experience by Dr. Harold W. Berkman, who states that he is the Vice Dean and Professor of Management and Marketing, School of Business Administration, University of Miami. Dr. Berkman is also an evaluator for Josef Silny & Associates, Inc. In all three evaluations, Dr. Berkman finds the beneficiary's education and nine years of work experience to be equivalent to a bachelor's degree in business administration with a specialization in advertising and promotion. In his third evaluation, Dr. Berkman states:

. . . Ms. [REDACTED] positions have required a broad understanding of various functional fields of business such as finance, accounting, management and marketing, etc.

This Service uses an independent evaluation of a person's foreign credentials in terms of education in the United States as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be rejected or given less weight. See Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988).

In this case, the first evaluator, Freda Clement-Willis, did not find the beneficiary's foreign education to be equivalent to a baccalaureate degree in a specialized field of study from an accredited college or university in the United States.

Dr. Berkman based his conclusion on the beneficiary's resume and the four employment letters contained in the record. The Service notes the following deficiencies in the evidence of record:

First, as stated above, no evidence has been provided to document the beneficiary's employment for Colgate Palmolive from 1993 to 1994.

Second, the authors of the letters from Valencia & Soto and Centrum, Ogilvy and Mather do not specify the beneficiary's title during her employment for those companies.

Third, the attention of the Service is drawn to the remarkable similarity of the employment letters from Valencia & Soto and Centrum, Ogilvy and Mather. Both authors state that the beneficiary conducted market research and projections of product consumption, growth and development; marketing for sales of mass consumption products; and creating art designs and illustrations using Macintosh software. It would be unusual for an individual to perform exactly the same duties for two different companies, and even more unusual that an official of each company would describe the beneficiary's duties in essentially the same words. This remarkable similarity would suggest that both letters were written by the same person. Since both letters appear to have been written by the same person, the Service must question whether they represent the true testimony of the avowed authors. The Service may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I&N Dec. 791 (Comm., 1988).

Furthermore, if the beneficiary performed exactly the same duties for one company before she attended the Academy of Professional Drafting and for another company after she completed her studies at that institution, it cannot be concluded that the petitioner has demonstrated that the beneficiary has received recognition of expertise in the specialty through *progressively responsible positions relating to the specialty* as set forth at 214(i)(1)(C)(ii) of the Act.

Finally, the employment letters contained in the record provide no information as to the size and scope of the business operations of those companies or the number of employees and their educational credentials. Without this information, it is not clear how Dr.

Berkman was able to make a determination as to whether the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation or that the beneficiary's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.

For the reasons discussed above, the evaluations by Ms. Clement-Willis and Dr. Berkman are accorded little weight.

The beneficiary is not a member of any organizations whose usual prerequisite for entry is a baccalaureate degree in a specialized area. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes him to practice a specialty occupation in a foreign country. The record does not contain any published material by or about the alien in professional publications, trade journals, or major newspapers. No evidence has been submitted to document any achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary has the equivalent of a baccalaureate degree in a specialty occupation.

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 decision of the Associate Commissioner dated February 3, 1999 is affirmed.