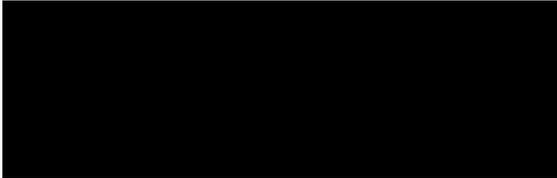


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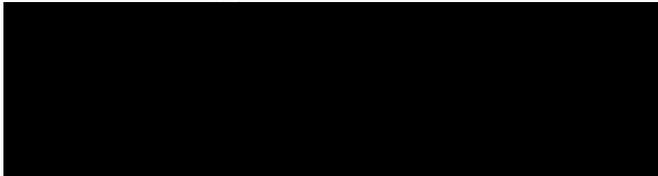
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FILE: EAC 03 106 52599 Office: VERMONT SERVICE CENTER Date: JUN 02 2004

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.

Mari Plussa

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and 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 computer software and website services company. It seeks to employ the beneficiary as a marketing manager for its information technology solutions. 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 because the proffered position does not appear to be a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation and submits further documentation.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence; (4) counsel's letter that responds to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing manager for the petitioner's computer services business that focuses on IT solutions. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; the petitioner's letter in support of the petition; and counsel's letter in response to the director's request for further evidence. According to the initial petition, the beneficiary would be responsible for the planning and execution of the petitioner's marketing strategy for its web development and other IT services. In addition, she would direct all aspects of product marketing including doing market analysis, defining budgets, setting prices, and defining market positioning. In addition, the petitioner stated that the beneficiary would be responsible for coordinating with the in-house software development team and actively involved in the design, testing and implementation of all web/IT solutions prior to delivering them to customers.

In the petitioner's response to the director's request for further evidence, the petitioner further explained that the 100 per cent of the beneficiary's time would be spent on the marketing effort. It also explained that her technology expertise would be used in technical presentations to customers. The petitioner implies in its petition that the position requires a bachelor's degree in marketing or computer technology and systems management.

The director found that the proffered position was not a specialty occupation because the duties were not complex, or unique enough to require a baccalaureate degree in a specific specialty. The director also stated that the petitioner had not provided information on the academic credentials of the petitioner's president, who is the person presently performing the marketing duties for the petitioner. The director also referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classifications of market research analysts and marketing managers and listed the type of industries identified in the *Handbook* as sources of employment for marketing managers. The director did not find the petitioner's business within the list of industries that typically required the services of a marketing manager who performs only market management duties. The director also stated that the *Handbook* indicated that most employers prefer a wide range of educational backgrounds for marketing manager positions or promote individuals within companies for marketing manager. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that a baccalaureate degree is the normal minimum requirement in the proffered position, and that the degree is a common requirement in the industry. Counsel submits job descriptions for other companies who are marketing high technology products and services. In addition, counsel submits three expert opinions to address the complexity or unique nature of the duties of the proffered position. . The three opinions are from § ██████████ Associate Professor; ██████████ lecturer; and ██████████ Associate Professor. All three letter-writers are employed by Goldey-Beacom College, a private business school in Wilmington, Delaware. The petitioner also states that it required a person qualified in marketing and the technical aspects of the computer projects. The petitioner also states that small or medium to large size companies want to hire the most qualified candidates for the technical marketing efforts because they compete for the same customer pool.

Upon review of the record, the petitioner has not established any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position, it appears to be an amalgam position combining knowledge of computer software and web-based applications along with technical marketing management skills. As such, it combines the primary duties of a marketing manager with technical sales responsibilities, along with responsibilities in the design and development of computer products. Contrary to the director's decision, such positions are not found primarily in the companies listed in the director's decision, such as economic and marketing research firms, and securities and commodities brokers. This excerpt with regard to types of businesses is taken from the *Handbook's* description of economists and market research analysts, which is a distinct classification from the *Handbook's* classifications of advertising, marketing, promotions, public relations, and sales managers and sales representatives, wholesale and manufacturing which are analogous to the proffered position. The beneficiary's role within the petitioner's marketing effort appears to be similar to the duties of a technical expert, as discussed in the *Handbook* sales representative classification. With regard to the training requirements for sales representatives, the *Handbook* states:

The background needed for sales job varies by product line and market. Most firms require a strong educational background and increasingly prefer or require a bachelor's degree as the job requirements have become more technical and analytical. Nevertheless, many employers still hire individuals with previous sales experience who do not have a college degree. . . . On the other hand, firms selling complex, technical products may require a technical degree in addition to some sales experience.

With regard to marketing managers, the *Handbook* does note that in small businesses, the owner or chief executive officers may assume all advertising, promotions, marketing, sales and public relations responsibilities, while in larger firms, various managers may coordinate specific parts of any marketing endeavor. This statement does not preclude a smaller firm from hiring individuals as marketing managers, or employees with combined duties such as the proffered position. With regard to training requirements for marketing managers, the *Handbook* indicates that a wide range of educational backgrounds are suitable for entry into marketing management jobs; however, many employers prefer those with experience in related occupations plus a broad liberal arts background. The *Handbook* also states:

For marketing, sales, and promotion 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.

In reviewing the training requirements for both classifications, the *Handbook* does not indicate that employers in either field require a baccalaureate degree in a specific specialty. Therefore, the petitioner has not established that the minimum requirement for entry into the proffered position is a baccalaureate degree in a specific specialty.

With regard to parallel positions in similar computer services companies, on appeal, the petitioner submitted thirteen job vacancy announcements to the record. While all the job announcements required a baccalaureate degree, not all the vacancy announcements specified a baccalaureate degree in a specific specialty. In addition, while some of the companies advertising jobs appeared similar to the petitioner in business focus, namely the sale of customized computer and web-based services, several others did not appear to be firms similar to the petitioner. For example, one vacancy announcement is for the Philadelphia Corporation for the Aging and the candidate for the position could have a bachelor's degree in social work as well as other degrees such as marketing, business, or information science. Other positions appear to be strictly sales positions and do not involve any knowledge of or involvement in computer systems design.

The petitioner also submitted three letters from two professors and one lecturer from Goldey-Beacon Business College. This documentation is viewed as problematic. First, [REDACTED], the lecturer, appears to be an instructor in English and communications. It is not clear what would be his expertise in viewing the academic credentials for the proffered position. In addition, his statement merely affirms that a baccalaureate degree would be necessary for the proffered position, without identifying any particular specific specialty. Second, while the other two professors do specify that the proffered position would require a baccalaureate degree in marketing, their statements would not be sufficient to establish a nation-wide industry standard for the position. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Without more persuasive evidence, the petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated in its letter of support that its president had performed the duties of the proffered position previously and that its president did not have a baccalaureate degree. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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 stated that the duties of the position would primarily involve work in the marketing of computer and web-based services. However, the petitioner has not provided sufficient detail with regard to the beneficiary's marketing duties to establish that the nature of these duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. A review of the types of computer programs described in the petitioner's current contracts also does not provide sufficient detail with regard to either the beneficiary's marketing duties or her duties as the contact person between the petitioner's customers and its design team with regard to technical questions. Thus, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Contrary to the director's comments in his denial notice that the beneficiary would probably be qualified to perform the duties of the position, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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.

With regard to the academic credentials of the beneficiary, the petitioner submitted an educational equivalency document written by Dr. Terry Erb, credentials evaluator, Washington Evaluation Service, Washington, D.C. In addition, the petitioner submitted the following documentation:

A certificate from the Academic Council of Software Technology Group International Ltd, New Delhi, India dated July 30, 2000. This certificate states that the beneficiary completed a course in advanced diploma in web technology. There is no indication on the certificate as to the length of the coursework, or the academic standing of the technology group within the Indian higher education community.

The beneficiary's marks sheets for two years from the Fore School of Management in their postgraduate diploma in business management program. These mark sheets are dated August 7, 1997. The record is not clear as to whether these marks sheets constitute a formal diploma from the program. While it appears that the Fore School of Management is a management institute, its relationship to the Indian higher education system is not established in the record. The beneficiary's actual graduation from the program is also not established.

Two transcripts for one year of studies in software technology and systems management dated June of 1995 and November of 1995. The transcripts have a logo that says "NIIT". There is no indication in the record as to any relationship between these transcripts and the certificate dated July 2000.

The beneficiary's diploma from the University of Delhi, Janki Devi Mahavidyalaya College, dated 1994. The beneficiary's bachelor of arts (honours) degree course is identified as a 10+2+3

scheme on the diploma. *See* description of Indian higher education diplomas discussed later in this proceeding.

Two additional certificates from Janki Devi Mahavidyalaya College, University of New Delhi, dated March 18, 1993. These certificates indicate that the beneficiary attained academic prizes and awards from exams held for the 1991-1992 school year.

In his educational equivalency evaluation, Dr. Erb states:

[The beneficiary's] bachelor degree is academically equivalent to a Bachelor of Arts in Economics as awarded by an accredited U.S. university. . . . Her academic studies, combined with continued learning she acquired through her one year of computer studies, are academically equivalent to a second major in computer science as required by an accredited U.S. university. [The beneficiary's] 2-year graduate diploma is equivalent to a second major in business management with a concentration in marketing.

Upon review of the documentation submitted, the beneficiary's 1994 diploma from the University of Delhi appears to establish that the beneficiary obtained a bachelor's degree from a three-year university program. If so, the beneficiary's three-year bachelor's of arts degree from the University of Delhi will not be considered to be a foreign degree determined to be equivalent of a U.S. baccalaureate or higher degree. A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg. Comm. 1977). According to India's Department of Education, the nation's educational degree structure provides for both three-year and four-year bachelor's degree programs. After 12 years of primary and upper primary school, a bachelor's degree in the arts, commerce, or the sciences may be earned after three years of higher education. A bachelor's degree in a professional field of study, such as agriculture, dentistry, engineering, pharmacy, technology, and veterinary science, generally requires four years of education. *See generally* Government of India, Department of Education, *Higher Education in India, Academic Qualification Framework - Degree Structure*, (last updated October 1, 2001), available at <http://www.education.nic.in/htmlweb/higedu.htm>. If supported by a proper credentials evaluation, a four-year baccalaureate degree from India could reasonably be deemed to be the equivalent to a United States baccalaureate degree. However, in *Matter of Shah*, the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Matter of Shah* at 245. Thus, Dr. Erb's evaluation as to the equivalency of the beneficiary's three-year diploma to a U.S. baccalaureate degree is not accepted by the AAO.

In addition, as previously stated, the record does not establish the educational level of the computer studies undertaken by the beneficiary. If these studies were not done at a university level, or are considered to be vocational studies, the Washington Evaluation Service is not qualified to evaluate these studies. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, Dr. Erb's evaluation of the beneficiary's computer studies is also not accepted by the AAO. While his evaluation of any combination of university studies, including the beneficiary's studies in economics as well as studies at the Fore School of Management, if these latter studies are at a university level, would be accepted by the AAO, no such evaluation has been submitted

to the record. Thus, Dr. Erb's evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

Without more persuasive evidence, the beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the 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 of expertise in the specialty occupation as a result of such training and experience.

Dr. Erb does not appear qualified to meet the regulatory criterion identified at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The record is devoid of any information that he 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.

In addition, when CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), 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 occupation¹;
- (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, books, 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.

As previously, stated, the documentation in the record with regard to the beneficiary's web technology or software technology studies is not sufficiently explained to establish its equivalence to university studies or vocational studies in computer sciences. In addition, the petitioner did not submit any documentary evidence, beyond the beneficiary's resume, to establish the remaining criteria of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The AAO now turns to the beneficiary's prior work experience, and whether it included the theoretical and practical application of specialized knowledge required by the specialty. While the beneficiary's resume describes her numerous duties while working for the National Informatics Centre Services, Inc. in New Delhi for four years, her resume does not provide sufficient detail to establish any of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge. Furthermore, the beneficiary's resume does not indicate that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Finally, there is insufficient evidence that the beneficiary has recognition of expertise.

Based on the previous discussion, the petitioner has not established that the proffered position is a specialty occupation. In addition, it has not established that the beneficiary is qualified to perform the duties of the position.

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

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. Accordingly, the AAO shall not disturb the director's denial of the petition.

ORDER: The appeal is dismissed. The petition is denied.