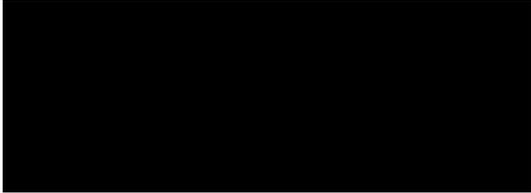




U.S. Citizenship
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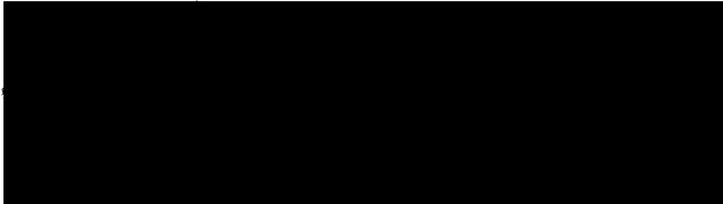


FILE: WAC 03 184 52169 Office: CALIFORNIA SERVICE CENTER Date: SEP 01 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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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 company that develops and markets hair restoration and dermatological treatment products, primarily sold in Japanese beauty salons. It seeks to employ the beneficiary as a brand architect. 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 he determined that the proffered position is not a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation that meets three of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel submits additional documentation.

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)(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, dated June 6, 2003; (4) the petitioner's and counsel's letter that respond 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 brand architect. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; the director's request for further evidence; and the petitioner's and counsel's letter in response to the director's request for further evidence. According to the job description submitted by the petitioner, the beneficiary's duties would involve designing and implementing strategic research projects to support and educate the petitioner's product packaging design, brand image development, marketing, and sales activities; incorporating clinical dermatological research results figures in the company's marketing and promotions; performing comparative research of competing products and companies operation in the petitioner's distribution areas; using research findings to develop strategies to increase the petitioner's position in targeted markets; develop and deliver product use training seminars designed to educate distributors, sales representatives and beauty salon personnel; and writing and presenting materials designed to educate salon professionals and products users regarding the biological aspects of hair loss, growth and re-growth, clinical trial results, related scientific statistics, and the resulting knowledge regarding proper use of the petitioner's products for minimum irritation and maximum benefit; working with the petitioner's contracted advertising company to develop market materials, to enhance the exclusivity of the petitioner's product line, and initiating and developing relationships with distributors and cosmetics companies marketing the product under their own label.

In his response to the director's request for further evidence, counsel provided a breakdown of the percentage of time to be spent by the beneficiary in the various job duties. Counsel indicates that 30 percent of the beneficiary's time would be spent working with a contracted advertising agency to develop marketing materials. Ten percent of her time would be spent in each of the following duties: designing and implementing strategic research projects; incorporating clinical dermatological research results figures into the petitioner's marketing efforts; performing comparative research of competing products in the petitioner's distribution areas; identifying customer needs; researching findings to develop merchandising and marketing strategies; and initiating and maintaining relationships with distributors and cosmetics companies marketing the petitioner's products under their own label. Counsel also stated that the position encompassed the duties of three position classifications in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, in the following proportions: sales promotion director (60 percent); market research analyst (30 percent), and sales, service promoter (ten percent). The petitioner indicated that the candidate for the brand architect position would possess a bachelor of science degree in the field of marketing, promotion, business sciences, or a related field, along with some kind of science background or intellectual ability to understand and communicate the scientific aspects of the petitioner's products and their use. Alternatively, the petitioner indicated that an individual with a degree in biochemistry, chemistry, or a related science field with marketing and brand development experience would also be qualified for the position.

The director found that the proffered position was not a specialty occupation and referred to the *Handbook's* classification of advertising, marketing, promotions, public relations, and sales manager. Based on the *Handbook's* information on training requirements for this classification, the director determined that a baccalaureate degree in a specific specialty was not required for entry into the position. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(ii)(A). The director also noted the petitioner's statement that the beneficiary would be performing the job duties of a sales promotion director for 60 percent of her time. The director stated that the record did not show that the beneficiary would be directing any staff in sales promotions; therefore the director stated that it appeared that the beneficiary would be involved in routine marketing type duties.

On appeal, counsel states that the proffered position met three of the four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel asserts that the position, at a minimum, requires a bachelor's degree in fashion promotion or in one of the related fields of marketing, promotion, or business sciences. Counsel submits thirteen job vacancy announcements to demonstrate that a baccalaureate degree is required for parallel positions in similar firms. Finally, counsel states that the beneficiary will be performing complex duties. Counsel states that the position involves knowledge of marketing strategies, technical (pharmaceutical) sales materials, brand management, market positioning and promotion in a highly technical scientific context for highly specialized products that require more tailored and sophisticated strategic planning than the average cosmetics product. Counsel adds that the petitioner's business is at a critical stage of branching out into the U.S. market.

Upon review of the record, the petitioner has established none of the four 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, the petitioner identifies three job categories in which the beneficiary's duties would overlap: sales promotion director, market research analyst, and sales, service promoter. As the director correctly noted, the petitioner does not appear to have a marketing or promotions staff, so the beneficiary does not appear to have supervisory responsibilities. This factor suggests that the job responsibilities of the beneficiary are somewhat lower in responsibility than a sales promotion director. The petitioner also indicated in the original breakdown of the beneficiary's position that the beneficiary would be spending 30 percent of her time working with a contracted advertising company to develop marketing materials, which also reflects more subordinate or entry level job responsibilities.

In addition, while the job titles stated by counsel of promotions director or sales promotion director, and sales, service promoter, appear analogous in part to the descriptions in the *Handbook* of advertising manager, and sales manager classification, with regard to training for these positions, the 2004-2005 edition of the *Handbook* states the following:

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 plus a broad liberal arts background. A bachelor's

degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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.

Thus the *Handbook* indicates that a range of academic disciplines would be appropriate for entry into sales promotions, or sales director positions. The petitioner has not established that a baccalaureate in a specific specialty is the minimum requirement for entry into the proffered position.

With regard to parallel positions in similar hair restoration and cosmetics firms, the petitioner submitted 13 job vacancy announcements. These job openings range from a merchandising coordinator with a Baltimore apparel and accessory consumer products company to a technical sales representative position in Montreal, Canada. Some vacancy announcements are also for brand manager positions. However, the academic requirements for the various positions vary. A brand manager position in Warsaw, Indiana requires that the candidate for the position have a B.S. degree or equivalent experience, while another branding manager position with a European biotechnology company simply requires a bachelor's degree with sales experience. These announcements do not establish that a baccalaureate degree in a specific specialty is the industry standard for parallel positions. 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. 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. On appeal, counsel notes that the petitioner had previously employed Kazu Namise as a marketing director. Counsel provides no further documentary evidence to establish the academic credentials of the previous marketing director. The record is also not clear that the beneficiary's position would entail the same duties as the former marketing director, or if it is distinct from this position. Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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. To the extent that they are depicted in the record, the duties of the position appear generic. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as a brand architect for a company in a critical phase of potential business growth. Although the petitioner provided documentary evidence as to the petitioner's product line, no further information was provided as to the specialized nature of an advertising strategy for clientele in a new country. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, 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.

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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.