



U.S. Citizenship
and Immigration
Services

D2

[REDACTED]

FILE: EAC 03 120 54486 Office: VERMONT SERVICE CENTER Date:

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:

[REDACTED]

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 attached to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The director of the service center 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 corporation engaged in the business of the importation and wholesale of diamonds, precious stones, and jewelry. In order to employ the petitioner as a marketing and promotion manager, the petitioner 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 on the basis that the petitioner had failed to establish that the proffered position meets the definition of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the director erred in denying the petition. To support this contention, section I of counsel's brief provides a "more detailed explanation of the duties of Marketing and Promotion Manager" than already submitted into the record. Section II of the brief is an explanation by counsel of why the petitioner "requires the services of a Professional/Specialty Occupation holder." In section III, counsel discusses the additional documentation that she submits with the brief, namely, letters from senior executives of four companies in the petitioner's business and an advisory opinion from a marketing professor at Pace University who is also a business and marketing consultant. According to the brief, counsel submits these documents to support her assertion that it is "customary" for diamond and gem companies similar to the petitioner "to employ professional degree-holding Marketing and Promotional Managers."

The director's decision to deny the petition was correct. The AAO bases this decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, and the "Professional Evaluation" letter submitted with the brief.

The AAO has not considered the aforementioned letters from senior executives from other firms that are submitted with the appellate brief. These documents are submitted for the first time on appeal. The director specifically requested such documents in the RFE:

Please submit evidence that in your company or industry a baccalaureate degree in a specific field of study is a standard minimum requirement for the job offered. Any attestations as to an industry standard must be a comparison for similarly-situated companies. Any correlation must be drawn to positions where the actual duties are similar. Your assertions should be supported by independent evidence/documentation to establish either the complexity of the position offered, or as to any industry/company standards for minimum qualifications of one holding a similar position.

As expressed at section III of the brief, counsel submits the letters to substantiate that the petitioner's educational requirements for the proffered position are "customary" or standard among similar employers in

the petitioner's industry. However, this type of evidence had not been submitted prior to the appeal, despite the fact that, as the above-quoted language indicates, the RFE had requested it.

The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. 8 C.F.R. §§ 103.2(b)(8) and (12). The regulation at 8 C.F.R. § 103.2(b)(11) (Submission of evidence in response to a [CIS] request) states:

All evidence submitted in response to a Service request must be submitted at one time. The submission of only some of the requested evidence will be considered a request for a decision based on the record.

Accordingly, where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. See *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's RFE. *Id.*

The AAO considered all the other evidence in the record of proceeding about the duties of the position, including: the Form I-129; the letters that the petitioner's vice president submitted with the Form I-129 and in response to the RFE; counsel's brief on appeal (including all its expanded information about the position's duties with regard to analysis of customer ordering and marketplace trends; study of competitors' pricing and service policies; direction and organization of service and order-fulfillment functions; explanation of marketing promotion programs; review of sales staff; and authorization of hiring, termination, bonuses, and incentives); and the Pace University marketing professor's advisory opinion.

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position’s duties.

The AAO recognizes the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO consulted both the 2004-2005 edition of the *Handbook* (the current version) and the 2002-2003 edition, which the director referenced in her decision. To the extent that they are described in the record, the duties of the proffered position comport with a combination of the marketing manager and promotion manager occupations as described in the “Advertising, Marketing, Promotions, Public Relations, and Sales Managers” section of the *Handbook*. However, as reflected in this excerpt from the 2004-2005 edition, the *Handbook* indicates that employers for such a position would not normally require at least a baccalaureate degree or its equivalent in a specific specialty:

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. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

The “Professional Evaluation” letter from the marketing professor at Pace University notes that the proffered position is “a specialty occupation requiring bachelor’s-level educational training in business administration,

finance, marketing, economics, or a related field and specialized knowledge in those fields.” The professor’s opinion is not persuasive. It is inconsistent with the information that the DOL provides in the *Handbook*. To support his opinion, the professor cites not to any published studies or other empirical data, but only to his generally described “academic experiences” and “ample opportunity to observe standard industry hiring practices as they pertain to a variety of marketing and communications positions.” The professor’s resume does not indicate any special experience in or professional emphasis on marketing and promotion management. Furthermore, there is no evidence that the professor has been recognized as an authority on marketing and promotion management. For these reasons, the AAO sees no reason to defer to this professor’s opinion or to accord it any weight. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

By adding accounting to the list of degrees acceptable for the proffered position, counsel asserts an even broader spectrum of acceptable academic majors for the petitioner’s particular marketing and promotion manager position than the Pace marketing professor. At page 3 of the brief, counsel states:

In order to perform [his or her duties], the Marketing and Promotion Manager must be capable of applying a comprehensive, integrated understanding of academic concepts and operational methodologies of multi-variant business disciplines, including marketing, finance, economics, accounting, and general business administration, toward the performance of multi-faceted managerial responsibilities consisting of promotions, sales and profitability planning, marketing and branding, customer service and staff training and supervision. Given the complexity of the duties of Marketing and Promotion Manager, the minimum requirement for the position is a Bachelor[’]s degree as well as relevant professional experience. Clearly, the duties [of the proffered position] are highly specialized and could not be carried out by anyone possessing less than a Bachelor[’]s degree in Business Administration, Marketing, Economics, Accounting, Finance, or [a] related field.¹

The acceptability of degrees across such a broad spectrum of academic disciplines as business administration, marketing, accounting, finance, “or a related field” is not indicative of a position requiring the application of a body of highly specialized knowledge. This spectrum is all the more expansive because the acceptable “related field” majors are not defined, and because, without further specification, acceptable majors with generalized titles, such as business administration – an acceptable major to this petitioner - or liberal arts, do not establish a position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

¹ Compare this with the professor’s opinion (at page 3 of his evaluation) that the proffered position “cannot be properly performed without bachelor’s-level training in business administration, finance, marketing, economics, or a related field.”

As the evidence of record does not establish that the proffered position is one for which employers normally require at least a bachelor's degree or the equivalent in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Also, the petitioner has not satisfied either of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a specific specialty baccalaureate or higher degree requirement that is common to the petitioner's industry in positions both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the evidence does not establish that the proffered position is a type for which the *Handbook* indicates an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, the record considered by the AAO does not include any submissions from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in a specific specialty.² For the reasons previously discussed, the AAO has discounted the marketing professor's opinion about industry-wide educational requirements for marketing and promotion managers. Furthermore, as also discussed above, the wide range of academic majors that the professor recognized as acceptable for marketing and promotion manager positions is not indicative of a position that requires a specialty occupation degree, that is, one that provides a body of highly specialized knowledge whose theoretical and practical application is required for performance of the proffered position.

The AAO also found that the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), which provides that "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." The position and its associated duties are presented in generalized terms that do not establish special complexity or uniqueness.

Next, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

² Of the four letters that the AAO did not consider, none provided a sufficient factual basis to substantiate counsel's assertion about certain degrees being customarily required for marketing and promotion manager positions in the petitioner's industry. Even if these letters were a proper matter for consideration on appeal, they do not prove an industry-wide degree standard.

In light of the statutory and regulatory definitions of specialty occupation cited earlier in this decision, this criterion has several evidentiary elements. First, the petitioner must demonstrate that it has an established history of hiring for the proffered position only persons with at least a bachelor's degree or equivalent. Second, this bachelor's degree or equivalent must be in a specific specialty that is characterized by a body of highly specialized knowledge. Third, the petitioner must also establish that both the nature and the level of highly specialized knowledge that the bachelor's degree or equivalent signifies are actually necessary for performance of the proffered position.

The most pertinent evidence of record is this statement at the last paragraph of the letter that the petitioner's vice president submitted in response to the RFE:

This work was formerly done for us by [person named] who held a bachelor's degree in marketing and who left our employment in the fall of 2002. We have found that we need to fill [his] position in order to maintain sales, and to work toward increasing them.

This limited information is insufficient to establish the type of normal hiring practice required for specialty occupation recognition under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the evidence does not establish that the specific duties of the proffered position are so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Therefore, the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) has not been satisfied.

The AAO accorded no weight to the unsubstantiated assertions of counsel and the petitioner's vice president to the effect that specialization and complexity of the proffered position and its duties establish a specialty occupation. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the petitioner has not established that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, the AAO notes that the petitioner has not presented sufficient evidence in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D) to establish that the beneficiary is qualified to perform services in a specialty occupation by virtue of a foreign equivalent of U.S. bachelor's degree in business administration with a marketing concentration.

The petitioner relies upon the evaluation that the TrustForte Corporation has rendered on the beneficiary's experience and foreign education. However, in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(3), CIS recognizes a credentials evaluation service's determination only to the extent that it is based upon a beneficiary's education. Hence, the TrustForte Corporation document is sufficient to establish only that the beneficiary has obtained the equivalent of three years in a U.S. bachelor of business administration program. Furthermore, the evidence of record, including the letters submitted from the beneficiary's former employers,

is not sufficient to meet the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) for a CIS determination that a specialty occupation degree “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 or expertise in the specialty occupation as a result of such training and experience.”

The letters submitted about the beneficiary’s work history do not satisfy the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) that, in order to have CIS credit the beneficiary’s work experience towards the achievement of a U.S.-equivalent baccalaureate degree in a specific specialty, the record must clearly demonstrate that (1) “the alien’s training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation” and (2) “the alien’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation.” Also, there is no evidence relating to the type of professional recognition required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (i) to (v).

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.