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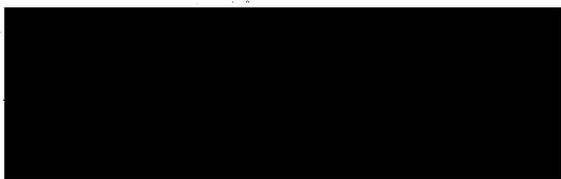
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20 Mass. Ave., N.W., Rm. A3042  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

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FILE: [Redacted] Office: VERMONT SERVICE CENTER Date: APR 06 2005

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*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the Vermont 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 printing and graphic design business with 15 employees. It seeks to hire the beneficiary as a marketing manager. The director denied the petition because he determined the petitioner had failed to establish that its proffered position qualified as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with a letter from counsel and additional documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue to be discussed in this proceeding is whether the petitioner has established that its proffered position qualifies as a specialty occupation. To meet its burden of proof, the petitioner must establish its eligibility under the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a petitioner must establish that its position meets one of four 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS 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 (5<sup>th</sup> 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it seeks the beneficiary's services as a marketing manager. Evidence regarding the proffered position is found in: the Form I-129 and an August 8, 2002 letter from counsel. In this letter, counsel characterizes the duties of the petitioner's proffered position as follows:

- Effectively communicate results and recommendations to management; coordinate with others to develop market segmentation strategies and to ensure smooth execution of strategies;
- Be responsible for providing campaign forecast to internal operations groups; track and report all results for current marketing campaigns;
- Be responsible for maintaining marketing budget through tracking of marketing expenses, and for tracking variances in the budget; report variances instead of being proactive and using the data to forecast;
- Handle and prioritize multiple assignments to ensure their completion within prescribed time constraints;
- Interact with all levels of management as well as other support organizations to resolve issues that may require additional management involvement for timely resolution;
- Be responsible for support of all phases of systems development life cycle for implementing a variety of marketing applications;
- Organize data, and design and prepare technical reports and related documentation; arrange for preparation of charts and graphs to record results; and
- Develop estimates for completing analysis and design activities, and develop and document templates to standardize procedures.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the

AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The director's review of the duties described by counsel led him to conclude that the proffered position was that of a marketing manager. Based on its own review of the position's duties and the 2004-2005 *Handbook's* discussion of the occupational title of advertising, marketing, promotions, public relations, and sales managers, the AAO also finds the petitioner's employment to be that of a marketing manager, as discussed at pages 23-24 of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably. In small firms, the owner or chief executive officer might assume all advertising, promotions, marketing, sales, and public relations responsibilities. In large firms, which may offer numerous products and services nationally or even worldwide, an executive vice president directs overall advertising, promotions, marketing, sales, and public relations policies . . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

*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 . . . . 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 . . . .

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

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 . . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists . . . .

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the time of filing, counsel asserted that the CIS regulatory language lists the occupation of marketing manager as a specialty occupation. On appeal, he contends that this same regulatory language states that business specialties, among which he includes the occupation of marketing manager, require a degree and are, therefore, a specialty occupation. In making these statements, counsel appears to have misinterpreted the language at 8 C.F.R. § 214.2(h)(4)(ii), which defines a specialty occupation as one which requires the theoretical and practical application of a body of highly specialized knowledge in "fields of human endeavor" and the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The AAO acknowledges that one of the fields of human endeavor specifically listed in the regulatory language is "business specialties." However, it is not all business specialties that qualify as specialty occupations, but only those requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a baccalaureate or higher degree, or its equivalent, in the specialty. The occupation of marketing manager does not normally impose a degree requirement on those seeking employment. Therefore, it is not a specialty occupation, even though it may be characterized as a business specialty.

To determine whether the petitioner's position meets the second criterion -- that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty -- the AAO has reviewed the Internet job postings submitted by counsel on appeal. The listing of the marketing manager positions from "Monster.com" and the separate Internet listing from a marketing firm do not, however, constitute evidence that firms of similar size and with similar operations require baccalaureate or higher degrees in parallel positions. The Monster.com job postings reflect the employment needs of organizations identified only by company name and list positions referenced only by title, precluding any comparison with the petitioner's business or the proffered position. The separate listing for a marketing manager comes from a company that, despite counsel's assertion to the contrary, is not similar to the petitioner, nor does its description of the advertised position lead to the conclusion that the job opening is parallel to the proffered position. With regard to the second prong noted above, the AAO finds nothing in the

record to establish that the position is either so complex or unique that it can be performed only by a degreed individual.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. As the proffered position is newly created in response to the needs of the petitioner's expanding business, the petitioner can provide no evidence that would meet the requirements of the third criterion. In response to the director's request for evidence, the petitioner stated it had three other marketing personnel in its employ, an assertion repeated by counsel on appeal. However, there is no evidence in the record to support these statements, nor to identify the duties of these positions. Simply going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has presented no evidence that would meet the requirements of the third criterion.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. While, on appeal, counsel states that the duties of the proffered position are both complex and specialized, and require someone with a degree, the AAO's review of the duties of the proffered position does not find them to reflect a higher degree of knowledge and skill than would normally be required of a marketing manager or to represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner in response to the director's request for evidence noted that it had recently received approval of an H-1B petition, but did not specify the position for which it petitioned. However, as stated by the director in his denial, CIS approval of a previous petition, even if for similar employment, does not provide a basis for approving the instant petition. CIS is not bound to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For the reasons already discussed, the petitioner has failed to establish that the proffered position meets any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial.

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.