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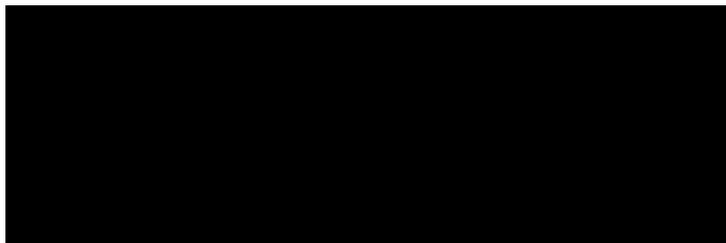
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
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Services

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FILE: WAC 04 038 51198 Office: CALIFORNIA SERVICE CENTER Date: **JAN 03 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:
[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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 an Internet directory service with 93 employees assisting businesses to advertise online. It seeks to hire the beneficiary as a vice president for marketing. The director found the proffered position to be a specialty occupation but denied the petition based on his determination that the beneficiary was not qualified to perform the duties of 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 statement and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

Although the director found the proffered position to qualify as a specialty occupation, the AAO, after reviewing the record before it, does not agree. It withdraws the director's finding based on the following analysis.

To meet its burden of proof in establishing that its proffered position is a specialty occupation, a petitioner must establish that the job it is offering to the beneficiary meets 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 one 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, 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 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 (5th Cir. 2000). The critical element is not the title of the position nor 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 is seeking the beneficiary's services as a vice president of marketing. Evidence of the beneficiary's duties includes: the Form I-129, with a support letter and a separate listing of duties from the petitioner; and counsel's response to the director's request for evidence.

At the time of filing, the petitioner identified the following duties to be performed by a vice president of marketing:

- Development of marketing strategies to position the petitioner as the pre-eminent national online business directory service;
- Implementation of marketing strategies and tactics, including the coordination of market research and conceptual development;
- Development and execution of all advertising and promotion campaigns for local and national markets;
- Supervision of on-going training of marketing and creative teams, including leading courses/seminars;
- Integration of marketing into the business in conjunction with sales groups, finance, engineering, data management and operations;
- Meeting with vendors and setting up all vendor agreements, and dealing with outside agencies/suppliers/contractors;

- Chairing and serving on committees to drive revenue and sales, and to oversee website review, work in progress, and work pipeline teams; and
- Establishment of best practices systems and procedures for marketing and creative teams.

In response to the director's request for evidence, counsel referenced these same duties but also noted that the vice president for marketing would be required to supervise the petitioner's marketing manager and his three coordinators, as well as the creative studio manager.

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 (DOL) *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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As the position of vice president for marketing will be responsible for developing and overseeing the petitioner's marketing strategy, the AAO turns first to the DOL *Handbook's* discussion of marketing managers. This discussion, which describes duties that largely parallel those listed by the petitioner for its proffered position, states the following with regard to marketing managers:

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.

In light of the petitioner's assertion that the position of vice president of marketing would also serve in a senior-management position, the AAO has also reviewed the *Handbook's* description of the duties of top executives. Here the *Handbook* states:

All organizations have specific goals and objectives that they strive to meet. Top executives devise strategies and formulate policies to ensure that these objectives are met. Although they have a wide range of titles -- such as chief executive officer, chief operating officer,

board chair, president, vice president, school superintendent, county administrator, or tax commissioner -- all formulate policies and direct the operations of business and corporations, nonprofit institutions, governments, and other organizations.

The nature of...high-level executives' responsibilities depends upon the size of the organization. In large organizations, the duties of such executives are highly specialized. Some managers, for instance, are responsible for the overall performance of one aspect of the organization, such as manufacturing, marketing, sales, purchasing, finance, personnel, training, administrative services, computer and information systems, property management, transportation, or the legal service department....

Based on these discussions and its review of the duties of the proffered position, the AAO concludes that the proffered position's oversight of the marketing of the petitioner's business, in conjunction with the vice president's involvement in directing other aspects of the petitioner's business, identify it as that of a marketing executive.

Having determined that the proffered position is aligned to that of a marketing executive, the AAO turns again to the *Handbook* to determine whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook* reports the following educational requirements for those seeking employment as marketing managers:

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....

For top executives, the acceptability of a broad range of backgrounds is even more pronounced:

The formal education and experience of top executives varies as widely as the nature of their responsibilities....

Because many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many top managers have been promoted from within the organization. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers. However, many companies prefer that their top executives have specialized backgrounds and, therefore, hire individuals who have been managers in other organizations.

In light of the *Handbook's* discussion regarding the range of backgrounds suitable for employment as a marketing manager or executive, the AAO finds that the proffered position does not qualify as a specialty occupation under the first criterion at 8 C.F. R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the particular position. The *Handbook* does not indicate that employers seeking marketing managers and executives require candidates to have the minimum of a baccalaureate or higher degree in a related field. While some employers may prefer degreed candidates, employer preference is not synonymous with the “normally required” language of the first criterion. Further, when a job, like that of a marketing manager or executive, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As already noted, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree in a specific specialty that is directly related to the proffered position.

The AAO notes that, in response to the director's request for evidence, counsel submitted an evaluation of the proffered position authored by Dr. Jonatan Jelen of Mercy College at Dobbs Ferry, New York, stating that the proffered position was a specialty occupation and required the minimum attainment of a baccalaureate degree in business administration, marketing or a related field. While the opinion of Dr. Jelen regarding the degree requirement for the proffered position is relevant to this proceeding, there is no independent evidence to substantiate his opinion. While he bases his authority on the academic positions he holds and has held at various universities, 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). Dr. Jelen's stated authority to grant college-level credit for employment experience is not probative in determining whether the petitioner's position is a specialty occupation and requires a specific academic degree.

In response to the director's request for evidence, counsel also referenced the SVP ratings assigned to the subordinate positions of marketing manager and creative studio manager by the *Dictionary of Occupational Titles (DOT)*, as proof that the minimum entry requirement for the proffered position is a baccalaureate or higher degree. Noting that both positions have an SVP rating of 8 and require a minimum of four years of vocational preparation, counsel contends that, as the vice president of marketing will supervise both employees, the proffered position requires no less preparation.

However, the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. This is also true of the *Occupational Information Network (O*Net)*, which has replaced the *DOT*, and which is also referenced by counsel in his response to the director's request for evidence. Both provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type

of degree, if any, that a position requires. As a result, CIS is not persuaded by a claim that a proffered position is a specialty occupation simply because it or subordinate positions have high SVP ratings.

Turning to consider the second criterion at 8 C.F.R. § 214.2(h)(iii)(A) -- 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 finds that the petitioner has submitted no evidence that would allow consideration of whether a degree requirement is an industry norm. Therefore, the AAO must conclude that the proffered position does not qualify as a specialty occupation under this alternative requirement.

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, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this case, counsel has submitted no evidence that the petitioner has previously employed degreed candidates in the position of vice president of marketing. Instead, in response to the director's request for evidence, counsel noted the degrees held by the marketing manager and creative studio manager, who would report to the vice president, and asserted that the employment of these individuals establishes the petitioner's practice of employing degreed personnel. However, the assertions of counsel, in the absence of documentation, do not constitute evidence and do not meet the petitioner's burden of proof in this proceeding. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). The statements made by these individuals regarding their educational backgrounds do not establish the petitioner's degree requirements regarding the proffered position. Further, they do not constitute evidence that the employment of these individuals was contingent on their academic backgrounds, merely that they possess academic degrees.

The fourth criterion requires the petitioner to establish that the nature of the proffered 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 in the specialty. As no evidence has been submitted to establish that the proffered position's specialization and complexity would require a higher degree of knowledge and skill than what would normally be expected of a marketing executive, the AAO finds that the position does not qualify as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO now turns to the issue of whether the beneficiary qualifies to perform the duties of the proffered position had it been found to qualify as a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of

such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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.

The beneficiary does not hold a degree, either U.S. or foreign, required by the specialty, and the duties of the proffered position do not require the beneficiary to have a license. Therefore, the AAO will analyze whether the beneficiary has education and/or experience that is equivalent to a U.S. degree in the specialty and whether his employment history shows that his expertise in his field has been recognized by progressively more responsible positions.

When a beneficiary is determined to lack the specific degree required by a specialty occupation, the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D) to determine whether the individual may still qualify to perform the proffered position. A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

- (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;
- (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.

At the time of filing and in response to the director's request for evidence, both the petitioner and counsel submitted an evaluation stating that the beneficiary's thirteen years of professional training and employment is the equivalent of a bachelor's degree in business administration, with a concentration in marketing. In his denial, the director discounted the evaluation because (a) it was not accompanied by documentation showing that the evaluator was authorized to grant college-level credit for training and/or experience in the specialty at an accredited college or university with a program for granting such credit, and (b) because the record did not specify the documentation on which the evaluator relied in reaching his conclusions regarding the beneficiary's employment history.

In response to the director's request for evidence, counsel submitted documentation regarding the college's programs for granting academic credit for professional experience. On appeal, counsel supplements that documentation with a letter from the Chair of the Division of Business & Accounting stating that the evaluator is authorized to evaluate and grant academic credit for employment experience. As the beneficiary's previous employment in marketing and advertising appears to fall within the degree programs of the business and accounting department, the AAO finds that the evaluator is authorized to evaluate the beneficiary's work experience. However, the record before the AAO continues to lack information regarding the documents on which the evaluator relied in his review of the beneficiary's employment experience. As a result, the AAO will not accept the evaluation as evidence that the beneficiary has the equivalent of a U.S. baccalaureate or higher degree in a specialty related to the proffered position.

On appeal, counsel asserts that the petitioner does not need to identify the documentation relied upon by the evaluator, that the director erroneously combined the requirements of two alternative criteria -- the academic evaluation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) and the CIS evaluation of the beneficiary's education, training and work experience at 8 C.F.R. § 214.2(h)(iii)(D)(5) -- when he requested such documentation. Counsel contends that the petitioner is not required to provide CIS with information on the documentation relied upon by the evaluator because the evaluation alone satisfies the regulatory requirement and a CIS review of the beneficiary's work experience is, therefore, irrelevant. The AAO does not, however, find counsel's interpretation of the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D) to be persuasive.

The authority to determine whether experience, which is substituted for education, includes the theoretical and practical application of specialized knowledge required by the specialty occupation rests with CIS. CIS views academic evaluations as advisory opinions only, opinions that may be discounted or given less weight if they are in any way questionable. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). As a result, CIS routinely requests supporting evidence to determine whether an evaluation may be relied upon in establishing equivalency to a U.S. academic degree. In the instant case, the director's request for evidence specifically asked that any academic evaluation provided by the petitioner "describe the material evaluated and establish that the areas of experience are related to the specialty. Resumes or curriculum vitas alone will not satisfy this requirement." Counsel did not, however, include such information in his response to the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying a petition. 8 C.F.R. § 103.2(b)(14).

The AAO now turns to the last of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D). When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

While the AAO notes that the beneficiary has thirteen years of employment experience in the fields of marketing and advertising, there is nothing in the record that would allow the AAO to make an evaluation of the extent to which this employment has required the theoretical and practical application of specialized knowledge. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). To determine that a beneficiary's training/work experience included the theoretical application of a body of highly specialized knowledge required by the specialty and that the experience was gained while working with others who held a degree in the specialty, the AAO normally reviews letters from the beneficiary's former employers stating the title of the beneficiary's position, his/her job duties, the beneficiary's supervisory or managerial responsibilities, if any, and the period of employment. The record in the instant case, however, contains neither such information, nor any that documentation that the beneficiary has been formally recognized for his expertise in the field. Although, in response to the director's request for evidence, counsel referenced the awards received by the beneficiary from advertising agencies in South Africa, New York, and Australia, this information comes from the beneficiary's curriculum vitae. Without documentary evidence, the beneficiary's resume is insufficient proof that the beneficiary has been recognized in his field. As a result, the AAO concludes that the petitioner has failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation per the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) and that the beneficiary is qualified to perform the duties of a specialty occupation per 8 C.F.R. § 214.2(h)(4)(iii)(C). Accordingly, although the AAO has withdrawn the director's finding that the proffered position qualifies as a specialty occupation, the AAO shall not disturb the director's denial of the petition.

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.