U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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FILE: WAC 03 264 55318 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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

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 independently-owned affiliate of Cydcor, U.S.A., Inc., which is a wholly-owned subsidiary of [redacted] a direct marketing company. The petitioner provides salespeople for [redacted] It seeks to hire the beneficiary as an account executive/communications representative. The director denied the petition based on his determination that the petitioner had failed to establish that the beneficiary was 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 counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner has established that the beneficiary is qualified to perform the duties of a specialty occupation. However, for the reasons discussed below, the AAO will first conduct its own analysis of the duties described by the petitioner at the time of filing.

To establish that the employment it is offering to the beneficiary qualifies as a specialty occupation, a petitioner must meet 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 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 an account executive/communications representative. Evidence of the beneficiary's duties includes: the Form I-129, with a September 19, 2003 letter of support from the petitioner; and counsel's December 9, 2003 response to the director's request for evidence.

At the time of filing, the petitioner provided an initial description of its proffered position, which counsel expanded upon in his response to the director's request for evidence. As described by counsel, the petitioner's account executive/communications representative would be required to:

- Analyze local markets for potential customers using traditional market research techniques (20 percent of the beneficiary's time);
- Design marketing programs to target these specific markets and potential clients, as well as develop product brochures, fact sheets, and advertising supplements, write copy, and lay out artwork for ads (40 percent of the beneficiary's time);
- Implement customized communications programs, purchasing advertising space, promoting goodwill through community involvement and networking events, contacting media representatives and otherwise representing the petitioner before the general public, conferring with clients, as needed, to obtain feedback about products and sales performance (20 percent of the beneficiary's time);
- Create and maintain databases containing results of marketing research, including current and potential customers, for use in analyzing local markets, including analysis of product performance in specific markets (10 percent of the beneficiary's time); and
- Review costs of particular advertising/marketing campaigns and compare to return to analyze cost effectiveness and provide recommendations regarding increase/decrease

> of sales of particular products based upon performance (10 percent of the beneficiary's time).

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.Min. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director, relying on the 2002-2003 edition of the DOL *Handbook*, determined that the duties of the proffered position placed it within the occupation of economists and market and survey researchers. As he found that individuals seeking employment in the field of market research were required to hold graduate degrees, he concluded that the proffered position was a specialty occupation. The AAO does not, however, fully concur with the director's analysis of the position's duties.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has relied upon the 2004-2005 edition of the *Handbook*. Unlike the director, it finds the position, as described by counsel, to fall under no specific occupational title. Instead, the petitioner's employment appears to combine the duties of a market and survey researcher with those of a public relations specialist. In describing the duties of marketing research analysts, the *Handbook* offers a partial description of the duties of the proffered position:

> Market or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need....
>
> After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

Other aspects of the position's responsibilities are covered by the *Handbook* in its discussion of the occupation of public relations specialists:

> An organization's reputation, profitability, and even its continued existence can depend on the degree to which its targeted 'publics' support its goals and policies. Public relations specialists -- also referred to as communications specialists and media specialists, among

> other titles -- serve as advocates for businesses, nonprofit associations, universities, hospitals, and other organizations, and build and maintain positive relationships with the public....
>
> Public relations specialists handle organizational functions such as media, community, consumer, industry, and governmental relations; political campaigns; interest-group representation; conflict mediation; or employee and investor relations.... To improve communication, public relations specialists establish and maintain cooperative relationships with representatives of community, consumer, employee, and public interest groups, and with representatives from print and broadcast journalism....
>
> Media specialists draft press releases and contact people in the media who might print or broadcast their material....
>
> Public affairs specialists also arrange and conduct programs to keep up contact between organization representatives and the public... These media specialists represent employers at community projects... In addition, they are responsible for preparing annual reports and writing proposals for various projects....
>
> In large organizations, the key public relations executive...may develop overall plans and policies with other executives. In addition, public relations departments employ public relations specialists to write, research, prepare materials, maintain contacts, and respond to inquiries.
>
> People who handle publicity for an individual or who direct public relations for a small organization may deal with all aspects of the job. They contact people, plan and research, and prepare materials for distribution. They also many handle advertising or sales promotion work to support marketing.

In that it combines market research and communications responsibilities, the AAO has looked to the *Handbook's* discussion of the educational requirements for employment in both the occupations just discussed to reach a conclusion regarding the degree requirement, if any, imposed by the petitioner's position. The *Handbook's* discussion of the educational preparation required for those seeking employment as public relations or communications specialists clearly indicates that the communications duties of the proffered position do not require the beneficiary to have the minimum of a baccalaureate degree to seek employment:

> There are no defined standards for entry into a public relations career. A college degree combined with public relations experience, usually gained through an internship, is considered excellent preparation for public relations work.... Many entry-level public relations specialists have a college major in public relations, journalism, advertising, or communication. Some firms seek college graduates who have worked in electronic or print journalism. Other employers seek applicants with demonstrated communication skills and training or experience in a field related to the firm's business....

However, the *Handbook's* discussion of market and survey researchers presents an occupation that clearly requires those seeking employment to have the appropriate degrees. In pertinent part, the description of the training required for market and survey researchers states:

> A master's degree is the minimum requirement for many private sector market and survey research jobs, and for advancement to more responsible positions. Market and survey researchers may earn advanced degrees in business administration, marketing statistics, communications, or some closely related discipline....
>
> Bachelor's degree holders who majored in marketing and related fields may qualify for many entry-level positions that might or might not be related to market and survey research. These positions include research assistant, administrative or management trainee, marketing interviewer, and salesperson, among others....
>
> In addition to being required for most market and survey research jobs in business and industry, a master's degree is usually the minimum requirement for a job as an instructor in junior and community colleges.

Based on the above discussion, the AAO concludes that the proffered position, although a mix of market research and public relations responsibilities, requires the beneficiary to hold a master's degree in a field related to market research. The degree requirement is not diminished by the fact that the position is one that includes duties other than those involving market research. Even though the position's market research duties may be limited, they, nevertheless, require the beneficiary to perform market research and, therefore, to hold a degree required for employment in that occupation. As the AAO finds that most market and survey research jobs in business and industry require master's degrees in fields related to market research, it finds the petitioner's proffered position, based on its market research duties, to be a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In concluding that the proffered position imposes a degree requirement at the master's level, the AAO notes the *Handbook's* discussion regarding individuals with bachelor's degrees. The *Handbook* states that those with baccalaureate degrees in marketing and related fields may qualify for entry-level positions "related to market and survey research" -- research assistants, administrative or management trainees, marketing interviewers, and salespersons. This discussion, does not, however, indicate that the actual occupation of market and survey researchers is open to such individuals, just that they may qualify for employment related to market and survey research. As a result, it does not conflict with the AAO's determination that the proffered position requires the beneficiary to hold a master's degree in one of the academic fields related to market and survey research.

On appeal, counsel contends that job duties of the petitioner's position do not require a master's degree, that a bachelor's degree is adequate preparation for an entry-level market research position of the type being offered by the petitioner. He quotes from 2002-2003 edition of the *Handbook*, as follows:

> Graduate education is required for many private sector economist and market and survey research jobs.... In the Federal Government, candidates for entry level positions must have a bachelor's degree....
>
> Whether working in government, industry, research organizations, marketing or consulting firms, economists and market and survey researchers with bachelor degrees usually qualify for most entry-level positions such as research assistant, administrative or management trainee, marketing interviewer, or any of a number of professional sales jobs.

However, the above language is not persuasive in establishing that the occupation of market researcher requires those seeking employment to have only a baccalaureate degree. Based on its own reading of the 2002-2003 edition of the *Handbook*, the AAO finds the discussion regarding Federal Government employment to be silent as to the employment of market researchers, stating only that candidates for "entry-level economist positions" must have bachelor's degrees. Further, the bachelor's degree requirement identified for employment as a research assistant, administrative or management trainee, marketing interviewer or salesperson does not, as already discussed, establish that the proffered position imposes less than a master's degree on the beneficiary. As previously noted, such positions are described in the 2004-2005 edition of the *Handbook* only as related to the occupation of market researcher. They do not equate to entry-level positions within the occupation.

In light of the petitioner's description of its proffered position and the organizational chart submitted by counsel in response to the director's request for evidence, counsel's statements on appeal regarding the entry-level nature of the proffered position are puzzling. His comparison of the proffered position's market research duties with those of research assistants or management trainees does not comport with the duties the petitioner has described, nor with the position's placement within the petitioner's organization. As stated by counsel in response to the director's request for evidence, the account executive/communications representative is to "manage client marketing activities," including within that overall responsibility the analysis of local markets, using traditional market research techniques, and the creation of a data base to support her market research responsibilities, as well as the analysis of product performance in specific markets. Counsel's statements on appeal comparing these responsibilities to entry-level duties that could be performed by a research assistant or a management trainee appear to contradict the petitioner's description of its proffered position.

To further support his contention that the proffered position requires the beneficiary to hold a bachelor's rather than a master's degree, counsel states that the "Federal Courts have held that the Service should defer to the employer's stated requirements for H-1B positions and should not rely exclusively on 'standardized government classification systems' such as the OOH." In support of this position, he references the findings in *Unico American Corporation v. Watson*, CV-89-6958 (C.D. Cal., March 19, 1991). However, this unpublished decision focuses on the Immigration and Naturalization Service's (INS) denial of an H-1B petition based on a decision that the duties of the petitioner's position were not professional in nature. As a result, its findings are not probative in this proceeding where CIS has found the proffered position to be a specialty occupation and it is the beneficiary's qualifications to perform the duties of a specialty occupation that are under review.

In response to counsel's assertions that CIS should defer to the petitioner's degree requirement for its position, the AAO notes that it is the duties of a position, not the petitioner's desires, which must dictate whether and at what level a particular job imposes a degree. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a baccalaureate or higher degree could be brought to the United States to perform any occupation so long as the employer required that individual to have a baccalaureate or higher degree.

The AAO now turns to a consideration of whether the beneficiary whom the petitioner seeks to employ is qualified to perform the duties of the proffered position of an account executive/communications representative.

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.

In his denial, the director found that the beneficiary to have a foreign degree that was the equivalent of a U.S. baccalaureate degree in communications. However, based on the master's degree required by the proffered position, he concluded that she did not have the required academic background to perform the duties of the occupation, nor the education, specialized training and experience that would be equivalent to such a degree.

In making its own analysis as to whether the beneficiary is qualified to perform the duties of the proffered position, the AAO first considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C)*(1)* and *(2)* -- whether the

beneficiary has a degree required by the specialty occupation from an accredited U.S. college or university, or a foreign degree that has been determined to be the equivalent of a U.S. baccalaureate or higher degree required by the specialty occupation.

While the beneficiary does not hold a U.S. baccalaureate degree from an accredited U.S. college or university in the specialty, the petitioner seeks to establish that she possesses a foreign degree that is the equivalent of the U.S. degree required by the proffered position. To meet its burden of proof, the petitioner, at the time of filing, submitted copies of a certification of the beneficiary's graduation from the University of Santo Tomas in Manila, The Philippines identifying the beneficiary as holding a Bachelor of Arts in communication arts, a transcript detailing the courses taken and credits earned by the beneficiary in satisfying the University's requirements, and an academic evaluation of the beneficiary's undergraduate transcript prepared by Morningside Evaluations and Consulting. The evaluation finds the beneficiary to possess the equivalent of a bachelor's degree in communications from an accredited institution of higher education in the United States.

The AAO has reviewed both the beneficiary's transcript and the Morningside evaluation of that transcript and, like the director, finds the beneficiary to hold the equivalent of a U.S. bachelor's degree in communications. However, as noted by the director in his denial, the beneficiary's baccalaureate degree does not establish that she is qualified to perform the duties of the proffered position. The position's duties require the beneficiary to perform as a market researcher. As individuals seeking employment as market researchers are normally required to hold master's degrees in business administration, marketing, statistics, communications, or another closely related discipline, the beneficiary's baccalaureate degree is insufficient to qualify her to perform the duties of the proffered position.

The AAO next turns to the third criterion – whether the beneficiary holds a license to practice in the proffered position. There is, however, no requirement that an individual working as an account executive/communications representative be licensed or certified. Accordingly, the petitioner cannot establish the beneficiary's eligibility to perform the duties of a specialty occupation based on the beneficiary's possession of a license or certification.

Finally, the AAO considers the fourth criterion -- whether the beneficiary has the education, specialized training, and/or progressively responsible experience that would be the equivalent of a U.S. baccalaureate or higher degree in the specialty occupation and whether her expertise in the specialty has been recognized through progressively responsible positions directly related to the specialty.

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 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 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.

Other than the academic evaluation already discussed, the record contains no evidence that responds to the evidentiary requirements of the first four criteria. Therefore, the AAO turns to an analysis of whether the beneficiary can meet the requirements at 8 C.F. R. § 214.2(h)(4)(iii)(D)*(5)* -- the beneficiary has acquired the equivalent of a degree in the specialty occupation through a combination of education, specialized training and/or work experience in areas related to the specialty and that the beneficiary has achieved recognition of her expertise in the specialty occupation as a result of such training and experience.

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 the 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.

The only evidence in the record regarding the beneficiary's qualifications for the proffered position is that related to her baccalaureate degree. Neither the petitioner, nor counsel have submitted any information regarding her employment history. As a result, the AAO is unable to assess whether she has employment or

training experience that, in conjunction with her undergraduate degree, might be the equivalent of a master's degree in a field related to the proffered position. Absent such information, it must conclude that the beneficiary is not qualified to perform the duties of the petitioner's position under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(C).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of its proffered position. Accordingly, 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.