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U.S. Citizenship
and Immigration
Services

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MAR 03 2005

FILE: WAC 04 026 51741 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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 advertising and marketing business with 40 employees. It seeks to hire the beneficiary as a marketing manager. The director 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 counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

Although the director's denial does not discuss the nature of the proffered position, it finds the beneficiary unqualified to perform the duties of the proffered position because she does not possess a bachelor's degree or its equivalent in the required field. In that the AAO has concluded that the proffered position is not a specialty occupation, it will first analyze the petitioner's employment before moving to a consideration of whether the beneficiary is qualified to perform the duties of a specialty occupation.

To qualify its position as 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 marketing manager. Evidence of the beneficiary's duties includes: the Form I-129, accompanied by a job description and a letter of support from the petitioner; and counsel's November 26, 2003 response to the director's request for evidence.

In her response to the director, counsel stated the following as duties of the proffered position:

- Manage or participate in the development of proposals and negotiate business agreements;
- Collaborate with other marketing teams to maximize the petitioner's business priorities;
- Direct sales and review advertising sales strategies and suggest changes to improve effectiveness;
- Convey petitioner's interest to the customer and the customer's interest to the petitioner's management; and
- Prepare advertisement layouts for print production, adjust the office organization structure toward the market change.

The AAO notes that counsel also lists "knowledge of marketing fundamentals, understanding of market return on investment and excellent communications skills" as a duty of the proffered position. However, as this language describes the type of background that would be helpful to the beneficiary rather than an activity to be performed by the beneficiary, the AAO has not included it in the above description.

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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In that the petitioner identified its proffered position as that of a marketing manager, the AAO has reviewed the description of that profession as discussed under the occupational title of advertising, marketing, promotions, public relations and sales managers in the 2004-2005 edition of the DOL *Handbook*. The *Handbook* 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.

Although the director concurred with the petitioner's identification of its proffered position as a marketing manager, the AAO does not agree. The duties listed by counsel do not identify the beneficiary as responsible for determining market demand, developing pricing strategies or monitoring market trends. In fact, the position description provided by counsel states that knowledge of marketing fundamentals and understanding market return on investment is a plus, rather than a requirement for the position. As a result, the AAO concludes that the petitioner's position is not that of a marketing manager.

Instead, to the limited extent that the petitioner has described the duties of its position, those duties appear focused on sales and advertising. The petitioner has stated that the beneficiary's primary responsibilities would include developing business proposals, negotiating agreements, and directing and reviewing strategies for the sale of advertising. From this basic description and based on a review of the petitioner's website, the proffered position appears to be one in which the beneficiary would have responsibility for directing the sale of the petitioner's marketing services through its publications, the *Chinese Consumer Yellow Pages* and the *California Yellow Pages* and its sponsorship of the Asian American Expo, and, electronically, through its

“Internet Website Technology.” Accordingly, the AAO finds the proffered position to be that of an account executive or sales manager, rather than a marketing manager.

The *Handbook* states the following regarding the role of account executives and sales managers:

The objective of any firm is to market and sell its products or services profitably....

Managers oversee advertising and promotion staffs, which usually are small, except in the largest firms.... The account executive manages the account services department, assesses the need for advertising, and, in advertising agencies, maintains the accounts of clients....

Sales managers direct the firm’s sales program.... Managers advise the sales representatives on ways to improve their sales performance.... Sales managers maintain contact with dealers and distributors. They analyze sales statistics.... Such information is vital to develop products and maximize profits.

Having determined that the proffered position is aligned to that of an account executive or sales manager, 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 account executives or sales 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....

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....

In light of the *Handbook’s* discussion regarding the range of backgrounds suitable for employment as a manager, 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 managers require candidates to have the minimum of a baccalaureate or higher degree in a related field or, for that matter, a degree of any kind, as most jobs are filled based on experience. While some

employers may prefer degreed candidates, employer preference is not synonymous with the “normally required” language of the first criterion.

The AAO notes that, in response to the director’s request for evidence, counsel submitted an evaluation of the proffered position prepared by ██████████ 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 marketing, management 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). ██████████ authority to grant college-level credit for employment experience, as noted in the record, is not probative in determining whether the petitioner’s position is a specialty occupation and requires a specific academic degree.

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 has reviewed the seven Internet job postings provided by counsel in response to the director’s request for evidence. However, these online advertisements do not establish that the degree imposed by the petitioner is the norm within its industry.

While the director found these announcements to describe employment similar to that offered by the petitioner, the AAO has reached a different conclusion. Of the seven advertisements, only three appear to represent organizations with businesses that involve the selling of advertising space and/or marketing services – TechTarget, *Investor’s Business Daily* and *WHERE Magazine*. The other companies represented by the job announcements are not advertising or marketing businesses. Of the three advertisements that do appear to come from advertising and/or marketing operations, only two provide specific duties for the positions they advertise – TechTarget and *Investor’s Business Daily*. However, based on the descriptions provided, the AAO concludes that these positions impose certain analytical and managerial responsibilities that distinguish them from the proffered position and, therefore, cannot be considered parallel to it. Also, neither announcement requires an applicant to hold a degree in a field related to the position being advertised. In the case of TechTarget, the job announcement even states the firm’s willingness to hire an applicant based on a “combination of education and experience,” rather than a degree. The AAO further notes that, of the seven advertisements submitted, three do not require a degree. Of the four that state a degree requirement, none requires the degree to be in a field related to the advertised position, although two state a preference in that regard. For all these reasons, the job announcements submitted by counsel fail to meet the requirements of the second criterion.

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 proffered position. Instead, in response to the director's request for evidence, counsel provided the petitioner's Internet posting for the proffered position, as well as an internal "position available notice." However, these announcements cannot serve as proof of the petitioner's normal hiring practices with regard to the proffered position. Therefore, the AAO must conclude that the petitioner has failed to establish its position as a specialty occupation under the third criterion.

In reviewing the petitioner's job announcements for its proffered position, the AAO has noted that they state a requirement for a degree in business or business administration. However, when a job can be performed by a degree of generalized title, e.g., business administration, 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. Accordingly, the job announcements submitted by counsel regarding the petitioner's degree requirement undermine, rather than strengthen, the petitioner's contention that its proffered position is a specialty occupation.

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. In response to the director's request for evidence, counsel asserted that the knowledge required to perform the duties of the proffered position required a baccalaureate degree, referencing the petitioner's job description and position announcement. However, the AAO has reviewed the position's duties, as described by counsel, and finds no evidence to establish that the proffered position's responsibilities would require a higher degree of knowledge and skill than what would normally be expected of an account executive or sales manager. Accordingly, the AAO finds that the position does not qualify as a specialty occupation under the last and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 can meet the fourth criterion listed above, i.e., whether she has education and/or experience that is equivalent to a U.S. degree in the specialty and whether her employment history shows that her expertise in her 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.

Counsel has submitted two evaluations of the beneficiary's employment experience to establish that she has the equivalent of a U.S. baccalaureate degree in management. The first, dated June 26, 2003, was prepared by the Foundation for International Services, Inc. in Bothell, Washington. The Foundation determined the beneficiary, based on her employment history, to have the equivalent of a bachelor's degree in business administration. However, the AAO will not accept this determination, as an evaluation service may only evaluate an alien's foreign academic credentials. 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Accordingly, the petitioner cannot establish that the beneficiary's employment experience is the equivalent of a baccalaureate degree on the basis of this evaluation.

In response to the director's request for evidence, counsel submitted a second evaluation, prepared by a professor who finds the beneficiary to have the equivalent of a baccalaureate degree in management. The AAO finds him qualified to provide an academic equivalency of the beneficiary's employment experience. Nevertheless, the AAO will not accept the professor's evaluation of the beneficiary's employment history.

A review of the record finds the only description of the duties of the beneficiary's employment to be provided by what appears to be her resume. The only independent evidence related to her employment are the translated "leaving certificates" noting the termination of her employment and the business registrations that describe the companies that previously employed her. The AAO must, therefore, assume that the professor's assessment of the beneficiary's employment history is based solely on her own account of that employment and that this information has not been otherwise documented. As a result, the assessment cannot serve as evidence in this proceeding.

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). In the instant case, the AAO will discount the evaluation in light of what appears to be its total reliance on what are no more than the beneficiary's assertions regarding her employment history. Accordingly, it finds that the petitioner has failed to establish that the beneficiary is qualified to perform the duties of a specialty occupation per the academic evaluation described at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

In that the record shows no other evidence that would allow the petitioner to establish the beneficiary's qualifications, 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 twelve years of employment experience in areas related to management, 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 See*, 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 no such information, or any documentation that the beneficiary has been formally recognized for her expertise in the field. Without any documentary evidence regarding the nature of the beneficiary's past employment, 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 AAO finds the petitioner to have 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) or 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 differs with the director regarding several aspects of his decision, it shall not disturb the director's denial of the petition. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the director did not identify all of the grounds for denial in his initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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.