

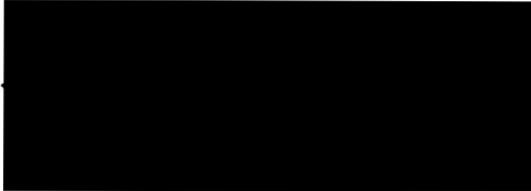


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FILE: WAC 04 800 49125 Office: CALIFORNIA SERVICE CENTER Date: JUL 17 2006

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The petitioner submitted an untimely appeal of that decision. The director treated the appeal as a motion to reopen/reconsider, but, again, denied it. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a children's clothing importer and distributor that seeks to extend the employment the beneficiary as a marketing manager and to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on the basis that the petitioner did not establish that the proposed position is a specialty occupation. On appeal, counsel submits a brief and previously submitted documents.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any bachelor's or higher degree, but one in a specific field of study that is directly related to the proposed position.

The record of proceeding before the AAO contains: (1) Form I-129 with supporting documents; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; (5) the Form I-290B with additional documents submitted on January 18, 2005; (6) the director's reopening of the petition and his subsequent denial; and (7) the Form I-1290B with new and previously submitted documents filed on February 23, 2005. The AAO reviewed the record in its entirety before issuing its decision.

Based on statements made on the Form I-290B filed on January 18, 2005, the director found the petitioner to have asserted that the proposed position is that of a marketing manager. Evidence of the beneficiary's duties includes the Form I-129 with accompanying support letter, the response to the RFE, and the petitioner's submissions on appeal. According to the evidence, provided at the time of filing and in response to the RFE, the beneficiary's duties would include: collecting information on trends and the latest developments in children's clothing and fashion accessories; assisting in the collection of customer information, such as purchase preference and buying habits; assisting in formulating marketing strategies; contributing ideas for new product development; and assisting in developing sales forecasts for key products and analyzing their market performance. The petitioner stated that the position required a bachelor's degree in economics.

The director found that the petitioner had failed to establish the proposed position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). He also concluded that the petitioner lacked the organizational complexity to justify a position for a marketing manager.

On appeal, counsel maintains the proffered position qualifies as specialty occupation based on the uniqueness of the position and the specialization and complexity of the position's duties. Counsel focuses his analysis on the second alternative prong of the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(2) and on the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(4). Counsel also asserts that the instant petition should be approved because it is an extension of an already approved petition.

The petitioner need only satisfy one of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) to establish that a position is a specialty occupation. Upon a thorough review of the record, the AAO concludes that the petitioner has failed to establish that the proposed position meets any of the four criteria outlined at 8 C.F.R. §214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

As a preliminary matter, the AAO will address counsel's assertion that the AAO should approve the instant petition because this is an extension request of a previously approved petition. Counsel submits a copy of the prior H-1B approval notice for beneficiary. This record of proceeding does not, however, contain all of the supporting evidence submitted with the previous petition. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in that prior case is similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proposed position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

To determine whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge and the

attainment of a bachelor's degree in a specific field of study as the minimum for entry into the occupation as required by the Act.

On appeal, counsel reiterates the duties of the position provided by the petitioner at the time of filing and in response to the RFE, but also describes an expanded role for the beneficiary that would require her to design and conduct market studies and based on the results to determine the petitioner's target markets for advertising and promotion, and the styles and designs and fabrics to be imported and distributed in the United States each season. Counsel also indicates that the beneficiary would be in charge of the petitioner's distribution channels, evaluating and selecting the most efficient methods and means, and would oversee the inspection of the petitioner's imported goods. He further asserts that the petitioner would prepare the petitioner's marketing and advertising budgets and determine the allocation of advertising and promotion monies. Moreover, he reports that the beneficiary would also oversee the petitioner's outside advertising and marketing agencies, two independent sales representatives, as well as several other workers. The AAO will not, however, consider these duties, as they describe a position that is materially different from that outlined by the petitioner at the time of filing and in response to the director's RFE. The duties presented on appeal significantly expand the scope and responsibilities of the proposed position and alter the nature of the employment initially described by the petitioner. On appeal or in response to an RFE, a petitioner may not offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. Based on the petitioner's description and a thorough review of the *Handbook*, the AAO finds that the description of the proposed position reflects that of marketing managers, who develop a firm's marketing strategy. This description mirrors the proposed duties of assisting in "formulating marketing strategies," "contributing ideas for new product development," and "developing sales forecasts for key products and analyzing their market performance." Notwithstanding this, the AAO finds that the petitioner has not established that the proposed position is a specialty occupation.

The petitioner has failed to establish that the position is one that qualifies as a specialty occupation under the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(1), a bachelor's or higher degree or its equivalent, in a specific field of study, is normally the minimum requirement for entry into the particular position. To determine whether the proposed position is a specialty occupation under this criterion, the AAO turns to the *Handbook's* discussion of the educational requirements for marketing managers. The *Handbook* indicates that a wide range of educational backgrounds is suitable for entry into marketing manager positions. Employers prefer applicants with bachelor's degrees but do not require them. Employers who do require bachelor's degrees do not always require that those degrees be in a business-related field. Finally employers often promote experienced staff into the position of marketing managers. Thus, the petitioner has failed to establish that a bachelor's degree or its equivalent, in a specific field of study, is normally the minimum requirement for entry into the proposed position.

The AAO turns next to the first alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether letters or affidavits from companies or individuals in the industry attest that such companies "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting

*Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). On appeal, counsel “concedes that it would be difficult for the position to qualify as a specialty under this criterion.” The petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor’s degree or its equivalent, in a specific field of study, for the position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner’s past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, the petitioner has submitted no evidence to establish its normal hiring practices. In the absence of an employment history for the proposed position, the petitioner cannot establish that its proposed position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity and uniqueness of the proposed position and the specialized nature and complexity of the proposed duties. A petitioner satisfies the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor’s degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s or higher degree in a specific field of study. The record lacks evidence to establish that the combined duties, as described by the petitioner, are so complex or unique that they can only be performed by an individual with a degree in a specific specialty, or that they are so specialized and complex as to require knowledge usually associated with the attainment of a bachelor’s degree or higher in a business-related field. The record contains no opinions provided by experts in the field or professional organizations that distinguish the proffered position or its duties from the typical employment of marketing managers, an occupational field that the *Handbook* has indicated does not impose a degree requirement. Therefore, the petitioner has not established that the proposed position is a specialty occupation based on its complexity or uniqueness, or the specialized nature of its duties.

The burden of proving eligibility for the benefit sought remains entirely 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.