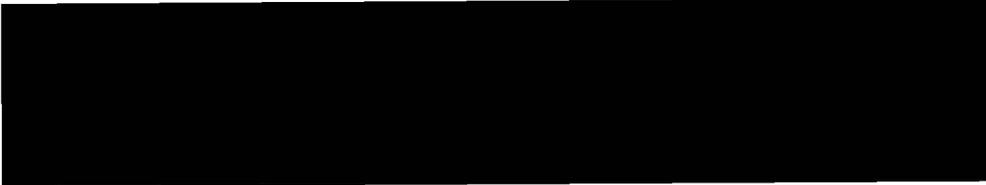




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: WAC 04 180 52977 Office: CALIFORNIA SERVICE CENTER Date: **MAY 08 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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiermann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is an importer and wholesaler of general clothing. It seeks to employ the beneficiary as a marketing manager and to extend her classification 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 ground that the proffered position is not a specialty occupation.

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.

As provided in 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 baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In its initial submission, including Form I-129 and an accompanying letter, the petitioner described itself as an importer and wholesaler of low-cost men's, women's and children's clothing and accessories to retail vendors such as Walgreen's, Sav-on, and Albertson's. The petitioner stated that it was established in 2001, had eleven employees, and earned gross annual income of \$1.4 million. A later submitted federal income tax return for 2003 records gross receipts of approximately \$9 million for the entire company. The petitioner stated that it wished to hire the beneficiary as a marketing manager/sales analyst and described the proffered position as follows:

[The beneficiary] shall assist our vendors control their store stock to its optimal level, always having the correct quantity or product on hand for a predetermined time span. She gathers daily Point of Sales (POS) data and processes replenishment orders for each SKU in each store. She is responsible for altering these parameters due to evolving sales trends, thereby allowing greater control of product flow. She calculates, analyzes and manages store inventories by utilizing pertinent sales, shipment and return data.

[The beneficiary] meets with clients' management in order to assess their requirements pertaining to our services. She evaluates the requirements and participates in the planning and development of strategies to achieve desired results. [The beneficiary] participates in the implementation of the accepted strategic plans. In addition, she monitors and evaluates the distribution of products and serves as liaison to identify both actual and potential distribution problems. Having targeted these problem areas, she will utilize her discretionary authority to implement solutions to rectify the problems.

Specifically, the duties include, but are not necessarily limited to, the following:

- Initiate market research studies and analyze their findings.
- Develop pricing strategies, balancing firm objectives and customer satisfaction.
- Use sales forecasting and strategic planning to ensure the sale and profitability of products, lines or services, analyzing business developments and monitoring market trends.
- Review operational records and reports to project sales and determine profitability.
- Analyze sales statistics to determine sales potential and inventory requirements and monitor the preferences of clients/customers.
Analyze gathered data and develop solutions or alternative methods of proceeding.

The minimum educational requirement for the proffered position, the petitioner indicated, is a bachelor's degree or the equivalent in commerce/business or marketing. The beneficiary qualifies for the position, the petitioner stated, by virtue of her bachelor of science in business administration, with a major in marketing management, from De La Salle University in Manila, the Philippines, granted on December 19, 1996. According to the report of a foreign educational credentials evaluation service in Mukiteo, Washington, the beneficiary's degree is equivalent to a bachelor of business administration, with a major in marketing management, from an accredited university in the United States.

In response to the RFE the petitioner indicated that it was growing rapidly – increasing its employees from 10 in December 2003 to 17 in June 2004 and to 36 by November 2004 – and that the beneficiary, who was approved for H-1B status in May 2003 pursuant to an earlier petition filed by another company, was hired as the petitioner’s marketing manager in June 2004. The petitioner summarized the duties of the position and the percentage of time required by each duty as follows:

- 20% Consolidate, analyze and compile internal sales and marketing information for all regions.
- 40% Support in [sic] the development of pricing and promotional guidelines.
- 10% Partner with retailers to continually improve understanding.
- 30% Support the Director for Sales and Marketing with analyses to ensure achievement of annual revenue, volume, demand planning, and share targets.

In his decision the director determined that the proffered position accords with the description of a marketing manager in the Department of Labor (DOL)’s *Occupational Outlook Handbook (Handbook)*, 2004-05 edition. The director quoted excerpts from the *Handbook* indicating that a baccalaureate level of study in a specific field is not the normal, industry-wide minimum requirement for entry into the occupation. The record did not establish that such a degree requirement is common to the petitioner’s industry in parallel positions among similar organizations, the director declared, that the petitioner normally required applicants for the position to have a baccalaureate or higher degree in a specific field, or that the proffered position and its duties are so complex, unique, or specialized that a baccalaureate or higher degree in a specialty, or equivalent knowledge, are required to perform the services of the job. The director concluded that the evidence was insufficient to show that the proffered position could not be performed by an experienced individual with less than a baccalaureate level of education.

On appeal counsel asserts that the director’s decision failed to address the facts of the case. According to counsel, the *Handbook* indicates that marketing managers require a bachelor’s degree in business administration, thus qualifying the occupation as a specialty occupation. Counsel refers to the California Service Center’s prior approval of H-1B status for the beneficiary, and asserts that this decision should control its determination in the instant petition because the underlying facts have not changed. Counsel discusses two other DOL resources on occupations – the *Occupational Information Network (O*NET)* and the *America’s CareerInfoNet* – and asserts that they confirm the *Handbook*’s assessment that a baccalaureate degree is required for marketing manager positions. According to counsel, the previously submitted internet job announcements for marketing managers further confirm that a bachelor’s degree is the minimum requirement for such a position. Lastly, the petitioner submits a declaration from its president stating that the beneficiary was hired for the proffered position specifically because of her educational degree.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; whether the industry’s professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms “routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F.Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the

position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The AAO agrees with the director that the duties of the proffered position reflect the DOL *Handbook's* description of a marketing manager, which is a subcategory of the broad category of advertising, marketing, promotions, public relations, and sales managers. As described in the *Handbook*, 2006-07 edition:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates . . . they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets – for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. . . . [T]hey monitor trends that indicate the need for new products and services and they oversee product development

With respect to the educational requirements of the occupation, the *Handbook, id.*, states the following:

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.

[F]or all these specialties, courses in management and completion of an internship while in school are highly recommended.

As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal, industry-wide requirement for entry into a marketing manager position. Many employers give favorable consideration to a broad spectrum of degrees in hiring for such a position. The AAO does not agree with counsel's assertion that other DOL occupational resources – including *O*NET* and *America's CareerInfoNet* – show that marketing managers require a baccalaureate or higher degree in a specific specialty. Counsel refers to the *O*NET's* designation of marketing manager as an occupation that normally requires “a four-year bachelor's degree,” and submits an excerpt from *America's CareerInfoNet* stating that a “bachelor's or higher degree, plus work experience” is the typical educational and training level for marketing managers. Neither of these two sources states that a baccalaureate or higher degree in a specific specialty is the normal minimum requirement for such positions. Thus, a marketing manager does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into such a position.

With regard to the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record includes four internet job listings for sales manager positions which were submitted with the petitioner's response to the RFE. Counsel asserts that twelve internet job postings were submitted in response to the RFE, but the record contains only four. Two of them state that a bachelor's degree is required for the position, without identifying a specialty field. The other two state that a business-related bachelor's degree is required. Thus, two of the four advertisements do not require a degree in any specific specialty. Though the other two indicate that the degree should be business-related, they do not state that a particular business specialty is required. The requirement of a degree with a generalized title such as business administration, without further specification of a specialized course of study that directly relates to the proffered position, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558, 560 (Comm. 1988). Thus, the job postings in the record do not establish that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. The evidence of record indicates that the scope and complexity of the position are in line with those of a typical marketing manager, for which a specialty degree is not required. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner states that it hired the beneficiary because of her degree – a bachelor of business administration with a major in marketing management. Since the proffered position is newly created, however, the petitioner has no history of requiring a specialty degree or its equivalent for the position. Accordingly, the petitioner cannot demonstrate that it normally requires a specialty degree or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. The evidence does not demonstrate that the duties of the position exceed those of a typical marketing manager in their scope or complexity. The AAO notes, in this regard, that the proffered position is subordinate to another marketing position – the sales and marketing director – in the petitioner's organizational chart. The AAO concludes that the proffered position does not require baccalaureate level knowledge in a specific specialty, as required for it to meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that the service center's prior approval of H-1B status for the beneficiary should control the decision in the instant petition because the facts have not changed. The AAO does not agree. There is no evidence in the record of the duties the beneficiary performed in H-1B status for her prior U.S. employer. Thus, there is no documentary support for counsel's contention that the underlying facts of her employment have not changed. **Unsupported assertions by counsel do not constitute evidence.** See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Simply going on record without supporting documentary evidence does not satisfy the petitioner's burden of proof. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). **Notwithstanding the**

approval of the prior H-1B petition, the current petition cannot be approved unless the record establishes current eligibility. The AAO is not obliged to approve applications or petitions in which eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). For the reasons previously discussed, the record in the instant proceeding does not show that the proffered position qualifies as a specialty occupation.

For the reasons discussed above, the record does not establish that the marketing manager position meets any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.