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FILE: WAC 04 800 49125 Office: CALIFORNIA SERVICE CENTER Date: **DEC 19 2007**

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, Chief
Administrative Appeals Office

DISCUSSION: On July 21, 2004, the petitioner filed Form I-129, Petition for a Nonimmigrant Worker (Form I-129), seeking to extend the employment of the beneficiary as a market research analyst 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, California Service Center, denied the nonimmigrant visa petition and a subsequent motion to reopen and reconsider. The petitioner appealed that decision to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on July 17, 2006. Subsequently, the petitioner filed a complaint for mandamus, declaratory and injunctive relief in the U.S. District Court for the Central District of California. *KK 2000, Inc.; Lee Choo Tan v. United States Citizenship and Immigration Services, et al.*, NO. CV-07-2291. Upon review, the AAO, on its own motion, reopened the matter and issued a request for further evidence (RFE). The petitioner responded through counsel on December 5, 2007. Upon review of the totality of the evidence in the record, the appeal will be dismissed. The petition will be denied.

The petitioner avers it is a children's clothing importer and distributor. The record of proceeding includes: (1) the Form I-129 filed July 21, 2004 and supporting documents; (2) the director's September 14, 2004 request for further evidence (RFE); (3) the petitioner's November 1, 2004 response to the RFE; (4) the director's December 13, 2004 denial decision; (5) the Form I-290B, Notice of Appeal; (6) the director's reopening of the matter and subsequent January 27, 2005 denial of the petition; (7) the Form I-290B with new and previously submitted documents filed February 23, 2005; (8) the AAO's July 17, 2006 dismissal of the appeal; (9) the AAO's August 16, 2007 (mailed September 13, 2007) RFE; and (10) counsel for the petitioner's response and supporting documents in support of the appeal. The AAO reviewed the record in its entirety before rendering its decision.

The director determined 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) and that the petitioner lacked the organizational complexity to justify a position for a marketing manager. On appeal prior counsel focused his analysis on the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that the petitioner's particular position qualified as a specialty occupation because the position is so complex or unique that it can be performed only by an individual with a degree and on the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), that the nature of the specific duties of the petitioner's proffered position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Upon review of all the evidence submitted, the AAO determined that the record of proceeding failed to establish any of the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In its August 16, 2007 RFE, the AAO emphasized that the record of proceeding as constituted lacked sufficient evidence to establish that the proffered position met any of the four criteria outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO also observed, preliminarily, that the petitioner's description of the duties in the instant petition as listed in the November 1, 2004 response to the RFE differed from the description provided in the previously filed petition (WAC 02 048 50104) that had been approved. The AAO noted, upon review of the record in the previous matter (WAC 02 048 50104), that the record did not contain evidence to support the petitioner's organizational structure as described; did not contain the detail necessary to establish that the proffered position included the duties of an occupation that required the theoretical and practical application of a body of highly specialized knowledge, and the 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; and did not contain sufficient supporting documentary evidence that the position as described satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The

AAO re-emphasizes that upon review of the H-1B visa petition filed November 23, 2001 and approved February 11, 2002 (WAC 02 048 50104), the record was materially deficient and the February 11, 2002 approval violated paragraph (h) of 8 C.F.R. § 214.2 and involved gross error; thus the petition was erroneously approved. Further, as the AAO observed in its July 17, 2006 decision, Citizenship and Immigration Services (CIS) is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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). Upon review of the record of proceeding in this matter, the petitioner likewise has failed to substantiate that the proffered position is a specialty occupation.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 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.

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.

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.

When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. 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).

On the Form I-129 filed July 21, 2004, the petitioner identified the job title of the proffered position as "marketing & sales" and the non-technical description of the job as "Market Research Analyst." On a continuation page attached to the Form I-129, the petitioner described the proposed duties as: "[a]ssist in collecting information on trend and latest development in kids fashion for the US market; collect customer information, such as preference and buying habits; assist in formulating marketing strategies." In a July 12, 2004 letter appended to the petition, the petitioner stated:

As our Market Research Analyst, [the beneficiary's] duties included: collection of information on the trend and latest development in kid's fashion, including but not limited to style, design, color, pattern, etc. for the US market; assist in collection of customer information such as purchase preference and buying habits; assist in using such information to formulate marketing strategies; and assist in examination and analysis of published information on kid's fashion to predict future trends in kid's fashion.

In a November 1, 2004 response to the director's RFE the petitioner listed the beneficiary's job duties for the position of market research analyst as:

Daily responsibilities vary widely, but include collecting information on trends and latest developments in children's clothing and fashion accessories and assist in collection of customer information as purchase preference and buying habits. Assist in formulating marketing strategies and contributing ideas for new product development. Also assist in developing sales forecasts for key products and analyzing their market performance.

About 40 percent of the beneficiary's time will be spent in "collecting information on trends and latest developments in children's clothing and fashion accessories and assisting collection of customer information as purchase preference and buying habits." Another 30 percent of the beneficiary's time will be spent in "formulating marketing strategies and contributing ideas for new product development." Another 30 percent of the beneficiary's time will be spent in "developing sales forecasts for key products and analyzing their market performance."

In response to the AAO's RFE, counsel for the petitioner submits the petitioner's December 3, 2007 letter repeating the beneficiary's duties of the position as:

Collection of information on the trend and latest development in kids' fashion, including but not limited to style, design, color, pattern, etc. for the US market:

- 40 percent of time
- The person will be responsible for the information developed and used in the formulation of style, design, color, pattern, quantity, quality, fabric pattern, etc., for company products. Such analysis is reported to our design department and our vendors.

Assist in collection of customer information, such as purchase preference and buying habits; and assist in using such information to formulate marketing strategies:

- 30 percent of time
- The person will be fully responsible for collection of such information and statistical analysis of internal information through compilation of data and outside information through contact with our customers, suppliers and other competitors. Such information is reported to our marketing department to formulate marketing strategies.

Assist in examination and analysis of published information on kids' fashion for future trend in kids' fashion:

- 30 percent of time
- The person will be responsible for examination and analysis of information concerning the latest trend in kids' fashion. Such information is reported to our design department.

The petitioner also describes its organizational structure and the nature of the beneficiary's position in the December 3, 2007 letter. The petitioner indicates it is "a volume importer and wholesaler of children's clothing with gross revenue over \$1.5 million" and that almost the entire clothing line is developed internally. The petitioner explains that its business structure requires: supplying its overseas design department, [REDACTED], in Thailand with the latest trends in children's clothing; supplying its marketing department, [REDACTED], with price information, market conditions, and consumer information; and contracting with a shipping company, Continental Agency for shipping services. The petitioner asserts that a market research analyst is critical to successfully developing and creating unique designs of cartoon characters for children's clothing. The petitioner does not provide other information regarding the significance of the beneficiary's design of appliques for children's fashion to her claimed role as a market research analyst. The petitioner does clarify the president's role in the organization, indicating that the president is the petitioner's sole shareholder and does not draw a salary; resides overseas and manages the business direction of the petitioner; and manages the design department/production partner, [REDACTED] in Thailand.

Counsel for the petitioner, in his December 5, 2007 response to the AAO's RFE, asserts that according to the Department of Labor's *Occupational Outlook Handbook*, (*Handbook*), the position of a market research analyst

requires at least a bachelor's degree and may require a master's degree. Counsel also references the Department of Labor's *O*NET* Summary Report on market research analysts that reports a market research analyst position has a JobZone 4 designation with a Specific Vocational Preparation (SVP) range between 7 and 8. Counsel contends that an SVP between 7 and 8 means that a four-year bachelor's degree is the minimum requirement for the position.

Counsel also submits eight job advertisements to show that market research analyst positions require a minimum of a four-year degree. The job listings include advertisements for: (1) a senior marketing research analyst for Prudential Financial companies that indicates the successful candidate must possess, among other things, conceptual knowledge of company financials, may be asked to write proposals, questionnaires and reports, and may conduct and commission original market research and which requires an undergraduate degree in an unspecified discipline; (2) a market research analyst for East West Bank that requires, among other things, the design and implementation of research methodology, the research and analysis of the feasibility and profitability of establishing a commercial banking center, and generating comparative analysis and reports and which requires a graduate degree in an unspecified discipline; (3) a business analyst for CaliforniaChoice to document business requirements, create functional specifications, project justification matrix, and analyze ROI, among other duties and which requires a bachelor's degree or higher; (4) a senior marketing research analyst for Neutrogena Corporation to manage research projects through design, execution and analysis phases, that will use appropriate research methodologies to identify new product ideas, analyze sales data, prepare and give presentations, among other things, and which requires the minimum of a bachelor's degree in an unspecified discipline; (5) a market research analyst (senior) manager for Crossroads Consulting that requires experience with quantitative research data and the ability to formulate information, and which requires a four-year degree in marketing, statistics, sociology, or psychology; (6) an administrative pricing analyst for Teledyne Microelectronic Technologies to submit price proposals, write proposals, fact-find, audit, and provide negotiation support and which requires a bachelor's degree in an unspecified discipline; (7) a marketing research analyst for Kelley Blue Book that lists the job responsibilities as including among other things, the creation of questionnaires and programming of surveys, analyzing data, preparing reports, translating raw data into pre-existing formats and which requires a bachelor's degree in an unspecified discipline; and (8) a marketing research analyst for Capital One that lists the job responsibilities as including, among other things, developing and executing research in support of business objectives, project types including qualitative, quantitative and secondary research, questionnaire design, data collection, analysis and reporting and which prefers a bachelor's degree in marketing research, statistics, or consumer psychology.

Counsel also avers that the proffered position is unique as the market research analyst position is an integral part of the petitioner's workflow. Counsel asserts that the research and analysis on fashion data is part of the creation and production process with the employer's design and production departments in Thailand and the research and analysis information on pricing, consumer preference, and buying habits is part of the pricing, marketing, and distribution strategies handled by the petitioner's marketing partner [REDACTED]. Counsel contends that the position is complex, as it requires "method of data collection, application of statistical models, and knowledge and understanding of both macro- and micro-economic data" because the children's fashion industry is ever changing. Counsel avers that the petitioner was able to obtain accurate market information and industry analysis for children's clothing and develop unique copyrighted designs after employing the beneficiary and has not been able to continue this because of the break in the beneficiary's employment. Counsel claims that collecting information and examining and analyzing the information require training and knowledge in data collection methods, application of statistical models, and macro-and micro-economic data, attained only through formal education in a higher educational institution. Counsel

asserts that even if the position is considered a marketing manager position, the complexity of the position and the uniqueness of the petitioner's business model qualify the position as a specialty occupation.

Counsel submits the petitioner's Internal Revenue Service (IRS) Forms 1120, U.S. Corporation Income Tax Return for 2004, 2005, and 2006. The petitioner's Form 1120 for 2004 shows: approximately \$1.2 million in gross receipts; \$51,403 in salaries and wages; \$2,624 in taxable income; \$8,559 in freight and customs; and \$0.00 in costs of labor. The petitioner's Form 1120 for 2005 shows: approximately \$1.25 million in gross receipts; \$62,850 in salaries and wages; \$3,194 in taxable income; \$160,625 in freight and customs; and \$0.00 in cost of labor. The petitioner's Form 1120 for 2006 shows: \$1.5 million in gross receipts; \$53,797 in salaries and wages; \$2,786 in taxable income; \$182,965 in freight and customs; and \$0.00 in cost of labor.

Counsel also submits: (1) copies of several cartoon character designs that have been registered with the United States copyright office; (2) copies of 12 unendorsed checks issued by the petitioner to ██████████ in the 2002 year and sales confirmations to the petitioner from ██████████, in the 2001 and 2002 years; and (3) shipping invoices and unendorsed checks issued by the petitioner to Continental Agency and Sterling Express in 2002, 2003, 2004 and 2005.

Counsel further submits the name page of the beneficiary's passport listing her profession as "travel director." Although requested by the AAO, the petitioner does not submit the beneficiary's complete passport or identify other names used by the beneficiary.

Preliminarily, the AAO finds that in this matter, although provided the opportunity to do so, the petitioner has not provided any documentary evidence of the beneficiary's work product while previously employed by the petitioner. The failure to produce any evidence of this nature or to provide a meaningful description of the duties of the proffered position, precludes the petitioner from establishing that the position qualifies as a specialty occupation pursuant to any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). However to more fully discuss the deficiencies of the record, the AAO makes the following determinations.

The record on appeal, including the response to the AAO's RFE, does not establish that the proffered position is a specialty occupation. The *Handbook* states the following with regard to the employment of marketing research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze statistical data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of 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 also might develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

* * *

Because of the applicability of market research to many industries, market research analysts are employed throughout the economy. . . .

As observed in the AAO's RFE, the *Handbook* discusses the occupation of marketing managers in the section on advertising, marketing, promotions, public relations and sales managers. The *Handbook* reports:

The objective of any firm is to market and sell its products or services profitably. . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

* * *

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets Marketing managers develop pricing strategy to help firms maximize profits and market share 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

The petitioner's vague description of the beneficiary's duties demonstrates only that the proffered position is one that includes tasks that are generally associated with a marketing position. The AAO acknowledges the *Handbook's* report that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs. The *Handbook*, however, does not specify that a degree in a specific discipline is required to perform the duties of a market research analyst; thus the position of a market research analyst is not a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Further, labeling a position as a "market research analyst" is insufficient to establish that the position incorporates the duties of a market research analyst including duties that require the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in a specific specialty. The *Handbook* indicates that a wide range of educational backgrounds is suitable for entry into marketing manager positions and that while employers prefer applicants with bachelor's degrees they do not require them. For those employers who do require bachelor's degrees, employers do not always require that those degrees be in a business-related field and often promote

experienced staff to the position of marketing manager. Moreover, the petitioner in this matter has not provided sufficient information to conclude that the beneficiary's actual tasks for the petitioner constitute the duties of either occupation.

The petitioner's general description resembles the *Handbook's* report on marketing managers in that the proposed duties include assisting in "formulating marketing strategies," "contributing ideas for new product development," and "collecting information on trends and latest developments in children's clothing." The petitioner's indication that the beneficiary will also assist in developing sales forecasts and analyzing market performance suggests that the beneficiary may also have responsibility for some analytical work. However, these general statements do not provide a comprehensive understanding of the beneficiary's actual daily duties that is sufficient to assess whether the beneficiary will be involved in the theoretical and practical application of a body of highly specialized knowledge attained through completion of a four-year course of specialized study at the university level.

The petitioner provides broad statements regarding the duties of the proffered position, rather than defining the activities associated with the position. For example, the petitioner does not describe how the beneficiary collects information, other than generally through contact with customers, suppliers, and competitors; the petitioner does not describe how the beneficiary develops the information; and the petitioner does not describe how the beneficiary assesses the market conditions for the petitioner. The ill-defined duties offer no insight into the daily tasks of the proffered position as those tasks relate directly to the petitioner's import and distribution of children's clothing. The petitioner does not provide examples of questionnaires, program surveys, price proposals, or qualitative, quantitative, and secondary research previously prepared by the beneficiary. There is no evidence that the beneficiary conducted original market research, prepared comparative analysis and reports, or how she implemented any research methodology she developed while working under the initially approved petition. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). A generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in relation to its particular business interests.

In this matter counsel for the petitioner, in response to the AAO's RFE, asserts that the position is complex, as it requires "method of data collection, application of statistical models, and knowledge and understanding of both macro- and micro-economic data" because the children's fashion industry is ever changing; and that collecting information and examining and analyzing the information require training and knowledge in data collection methods, application of statistical models, and macro-and micro-economic data, attained only through formal education in a higher educational institution. However, the record contains no evidence regarding the methods the beneficiary used to collect data, no information regarding the statistical models employed, and no evidence that the beneficiary applied knowledge of macro- or micro-economic data when performing her duties. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

To reiterate, upon close review of the description provided, the petitioner has opted to describe aspects of a generic marketing position without providing the detail necessary to assess whether the position incorporates the theoretical and practical application of specialized knowledge obtained through completion of a four-year course of study at the university level. The AAO declines to accept a broad overview of an occupation as definitive of a particular position's daily duties. The petitioner must provide some evidence of the daily tasks the petitioner requires from the proffered position. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. Each petitioner must detail its expectations of a proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS, however, must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty. In this matter the petitioner has not provided such a description.

The petitioner has failed to establish that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Turning to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner submits copies of eight job advertisements for positions primarily identified as market research occupations. The AAO has examined the eight job announcements; however, the job announcements submitted do not show that the advertising businesses are similar to the petitioner in size, number of employees, or level of business, nor can the job descriptions provided by these listings be established as parallel to the nonspecific job description provided for the proffered position. Moreover, as the record does not establish the actual duties of the position it precludes the petitioner from demonstrating that the proffered position is parallel to any degreed position within similar organizations in its industry. A review of the totality of the job announcements, the job descriptions contained therein, and the type of organizational entities advertising the positions, does not demonstrate that the proffered position is parallel to positions offered by organizations similar to the petitioner, which require a bachelor's degree in a specific specialty. The petitioner has not satisfied the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. As observed above, the petitioner has provided a brief overview of the duties the individual in the proffered position would perform; without a meaningful job description, the petitioner may not distinguish the position as more complex or unique than similar, but non-degreed, employment. The AAO has reviewed the petitioner's business model and notes the petitioner's explanation that it supplies its Thailand partner with new designs relevant to the latest trends in children's clothing and that it supplies a marketing company with price information, market conditions, and consumer information. The AAO acknowledges counsel's assertion that this business model creates a unique position. The AAO disagrees. As the *Handbook* reports in its discussion of marketing managers, the objective of any firm is to market and sell its products or services profitably. The petitioner in this matter has failed to distinguish the proffered position from a typical marketing position.

In addition to failing to offer a meaningful description of the duties of the position, the petitioner has not adequately explained the beneficiary's role in designing appliques for children's fashion. The record is unclear whether the beneficiary designs the cartoon character appliques¹ or reports information for the creation of such designs. As observed above, the record remains unclear regarding the beneficiary's actual duties and methods of gathering, submitting, and reporting information to the petitioner's partner in Thailand. Again, the record contains no documentary evidence of the relay of information from the petitioner to the "design" partner. Further, although the petitioner identifies [REDACTED] as the petitioner's marketing department, the record only contains sales confirmations issued to the petitioner from [REDACTED] evidencing the transfer of goods to the petitioner and 12 unendorsed checks issued to [REDACTED]. Furthermore, the record does not contain sales confirmations or checks issued after the end of 2002. The record does not contain agreements, contracts, or other documentation confirming the relationship between the petitioner's partner in Thailand or [REDACTED].

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The record does not contain sufficient consistent evidence validating the petitioner's business model and the beneficiary's role at the petitioner when the petition was filed. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner has not established that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position.

The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To establish the third criterion, the AAO usually 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 matter, although the petitioner claims it previously employed the beneficiary in a marketing position, the AAO has found the evidence offered previously insufficient to establish the position as a specialty occupation. The AAO acknowledges the petitioner's desire to hire the beneficiary in this matter; however, the petitioner has not provided substantive evidence that the duties of the proffered position as generally described require the theoretical and practical application of a body of highly specialized knowledge attained only through the completion of a bachelor's or higher degree. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The

¹ The AAO observes the registration of copyrighted cartoon character designs is owned and registered by Elsie Tan. The record does not provide any information on the identity of this individual. It is not clear whether this individual creates the appliques or is the registrar of the designs created elsewhere.

petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The AAO now turns to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) to assess whether the petitioner has established that the nature of the duties of its particular position is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. In this matter it is not. The AAO has again reviewed the duties of the position and the nature of the petitioner's business. Although the petitioner in this matter was accorded the opportunity to identify and explain how the nature of the duties of the position are so specialized and complex that the individual performing the duties must have attained a bachelor's degree or higher in a specific specialty, the petitioner did not provide such evidence. The AAO does not find the beneficiary's broadly stated involvement in supplying the petitioner's overseas design department with the latest trends in children's clothing and supplying the petitioner's marketing department with price information, market conditions, and consumer information to require a higher degree of knowledge and skill than would normally be required of an individual in a general marketing position. Nor has the petitioner described specific tasks or an amalgam of jobs that would require the theoretical and practical application of a body of highly specialized knowledge attained only through a four-year course of study resulting in a bachelor's or higher degree in a specific specialty. The petitioner does not submit a detailed description of the duties of the proffered position or otherwise demonstrate with examples or documentary evidence that the duties of the position incorporate analysis, design of particular collection methods, or forecasts of future market performance. The job duties described, when reviewed as a whole including the nature of the petitioner's business operations, do not reflect the specialization or complexity usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO acknowledges counsel's assertion that the petitioner was able to obtain accurate market information and industry analysis for children's clothing and develop unique copyrighted designs after employing the beneficiary and has not been able to continue this because of the break in the beneficiary's employment. However, the record in this matter does not contain documentary evidence establishing counsel's assertion. As noted above, the petitioner's IRS Forms for 2005 and 2006 show a steady growth in the petitioner's business. Thus the record does not support counsel's assertion. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506.

Upon review of the totality of the evidence submitted in support of the petition, the petitioner failed to establish that the proffered position is a specialty occupation.

The petition will be denied and the appeal dismissed for the above stated reason. 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. Accordingly, the director's decision will be affirmed.

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