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FILE: WAC 05 219 50143 Office: CALIFORNIA SERVICE CENTER Date: JAN 22 2007

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 Director, 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 manufactures photographic film and paper processing machines and imports photographic processing chemicals and photo paper. It claims to employ three personnel, have gross annual sales in excess of one million dollars, and have net annual income of \$1,323. It seeks to employ the beneficiary as a marketing director. Accordingly, the petitioner endeavors to classify the beneficiary 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 record of proceeding before the AAO contains: (1) the August 5, 2005 Form I-129 and supporting documentation; (2) the director's August 11, 2005, request for evidence (RFE); (3) counsel's September 22, 2005, response to the director's RFE; (3) the director's October 6, 2005, denial letter; and (4) the Form I-290B and counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

On October 6, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. Thus the issue before the AAO is whether the petitioner has established 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.

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.

The petitioner states that it is seeking the beneficiary's services as a marketing director. Evidence of the beneficiary's duties includes: the August 2, 2005 letter in support of the petition and a description of the job duties of the proffered position attached to counsel's September 22, 2005 response to the director's RFE.

In a letter appended to the petition, the petitioner indicated that the marketing director would: aid in developing new marketing strategies for national distributing and international exporting; coordinate advertising research and development operations as they relate to new products manufactured by the petitioner; aid in the development of marketing and sales strategies of existing product lines; and work with sales staff, outside professional consultants and advertising agencies and make reports and recommendations to the president. The petitioner stated the marketing director's specific duties would include:

Study and ascertain the current demands of wholesale-customers and final consumers of both U.S. and overseas including the promotion of domestic sales and future exporting;
Analyze data to determine and forecast future photographic film and paper processing trends and consumer demands;
Analyze data and recommend marketing, distribution, advertising[,] and sales policies both nationally and internationally;
Analyze data on export sales procedures in order to evaluate methodology and increase company product market presence and profitability on the international level;
Direct the development of advertising campaigns using all ad media required including mass communications (radio/T.V.), print and direct marketing.

The petitioner noted that its minimum requirement to qualify for the position is a bachelor's degree in communications, advertising, marketing, business or its equivalent and experience in the field of marketing.

In response to the director's August 11, 2005 RFE, the petitioner provided a list of specific duties including:

1. Planning for the participation of international Photo related exhibitions like PMA 2006 (Photo Marketing Association International) which will be held in February

2006 at Orlando, Florida USA, and FOCUS 2006 which will be held in February 2006 in Birmingham, England to develop new customers not only for domestic sales, but also international exporting.

2. Making out the schedule for the entire new product development processing cooperation with a mechanical engineer.
3. Planning IR (Investor Relation) & PR (Public Relation) strategies for listing the company on the NYSE or NASDAQ market within near future.
4. Develop pricing strategies, balancing firm objectives and customer satisfaction.
5. Identify, develop, and evaluate marketing strategy, based on knowledge of establishment objectives, market characteristics, and cost and markup factors.
6. Evaluate the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections.
7. Formulate, direct and coordinate marketing activities and policies to promote products and services, working with advertising and promotion managers.
8. Direct the hiring, training, and performance evaluations of marketing and sales staff and oversee their daily activities.
9. Negotiate contracts with vendors and distributors to manage product distribution, establishing distribution networks and developing distribution strategies.
10. Consult with product development personnel on product specifications such as design, color, and packaging.
11. Compile lists describing product or service offerings.
12. Use sales forecasting and strategic planning to ensure the sale and profitability of precuts, lines, or services, analyzing business developments and monitoring market trends.
13. Select products and accessories to be displayed at trade or special production shows.
14. Prepare budgets and submit estimates for program costs as part of campaign plan development.
15. Plan and prepare advertising and promotional material to increase sales of products or services, working with customers, company officials, sales departments and advertising agencies.
16. Assist with annual budget development.
17. Inspect layouts and advertising copy and edit scripts, audio and video tapes, and other promotional material for adherence to specifications.
18. Coordinate activities of departments, such as sales, graphic arts, media, finance, and research.
19. Prepare and negotiate advertising and sales contracts.
20. Identify and develop contacts for promotional campaigns and industry programs that meet identified buyer targets such as dealers, distributors, or consumers.
21. Gather and organize information to plan advertising campaigns.
22. Confer with department heads and/or staff to discuss topics such as contracts, selection of advertising media, or product to be advertised.
23. Confer with clients to provide marketing or technical advice.
24. Developing the essential marketing kits including web site, C.I. (Corporate Identity).

25. Planning marketing strategies and overseeing the preparation of promotional materials including brochures and media presentations.
26. Making decisions with respect to advertising campaign materials.
27. Scheming efficient sales campaign and product distribution.
28. Maintaining relations with newspapers or broadcast media.
29. Overseeing the management of advertising budgets.
30. Providing direction and instruction to outside public relations agencies.
31. Maintaining contact with press editors of trade and business publications.
32. Conduct all marketing operations, market development, price decision, and promotion of new products.

The petitioner also submitted a September 8, 2005 opinion letter authored by [REDACTED] Ph.D, Associate Professor of Marketing and Associate Dean and Director of Graduate Programs, Seattle Pacific University, Seattle, Washington, for the purpose of rendering an industry standard opinion. Dr. [REDACTED] offered his opinion on whether the position of marketing director for the petitioner requires at least a bachelor's degree as a job qualification. Dr. [REDACTED] opined that upon review of the proffered position's duties and using the Department of Labor's *Occupational Outlook Handbook (Handbook)* as a reference, the position "closely resembles the expectation one would have for a marketing/sales manager position." Dr. [REDACTED] further opined that "[t]heoretical and practical knowledge in marketing and business equivalent at least to a bachelor's degree in business administration specializing in marketing is required to perform the responsibilities of this job." Dr. [REDACTED] concluded that the proffered position should be construed as a specialty occupation as it parallels the *Handbook's* description of duties for a marketing/sales manager with market analyst characteristics.

The petitioner further provided copies of four Internet job advertisements for employment as: (1) a marketing manager for a cable company that included some similar duties to that of the proffered position wherein the employer indicated that a BA, BS or equivalent is preferred; (2) a marketing manager for a large international banking and financial services organization that provided a broad position description and indicated that a bachelor's degree in marketing or business administration, or equivalent experience is required; (3) a marketing manager for a county magazine/newspaper company that provided a generic position description and indicated a BS/BA and six years marketing or related experience is required; and (4) a marketing manager for an engineering employment consulting firm that required a BSChE/MBA and 10 plus years of experience in fuels and fuel plants.

On October 6, 2005, the director denied the petition determining that the proffered position is similar to the job of a marketing manager as listed under the title Advertising, Marketing, Promotions, Public Relations, and Sales Managers in the *Handbook*. The director observed that the *Handbook* reported that a wide range of educational backgrounds is suitable for the occupation of marketing manager. The director also determined that the job listings and the [REDACTED] opinion letter did not establish that a degree requirement is common to the industry in parallel positions among similar organizations. The director did not find that the lengthy job description provided sufficient detail to establish the proffered position as complex or unique. The director noted that the record did not contain evidence of the petitioner's past employment requirements for the position and thus it had not been established that the petitioner normally required a degreed employee for the proffered position. The director further determined that the petitioner had not established that the proffered position is any more specialized or complex than any other marketing manager job. The director concluded

that the record did not substantiate that only an individual with a baccalaureate degree could perform the duties of the proffered position.

On appeal, counsel for the petitioner asserts that the job description provided lists a variety of specific duties that overlap into different job descriptions; thus the position is a specialty occupation based on the combination of several positions. Counsel contends: "[m]aking out the schedule for the entire new product development processing cooperation with a mechanical engineer;" "[e]valuat[ing] the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections;" "[using] sales forecasting and strategic planning to ensure the sale and profitability of precuts, lines, or services, analyzing business developments and monitoring market trends;" and "[p]repar[ing] budgets and submit[ting] estimates for program costs as part of campaign plan development" are the duties of a management analyst. Counsel observes that a management analyst uses mathematical models to describe and analyze a problem and to create a business solution. Counsel claims that the beneficiary's duty of "[using] sales forecasting and strategic planning to ensure the sale and profitability of precuts, lines, or services, analyzing business developments and monitoring market trends" is the same as using mathematical models to describe and analyze a problem and to create a business solution.

Counsel also avers that some of the duties described in the petitioner's response to the director's RFE resemble those of a graphic designer. Counsel concludes that as the proffered position combines the duties of a management analyst, a sales representative, a market and survey researcher, and a graphic designer and that the *Handbook* indicates that some of the duties could not be performed without the attainment of a baccalaureate degree; thus the position must be that of a specialty occupation.

Counsel also references the four job announcements previously submitted. Counsel asserts that the four "marketing director" position advertisements contain job descriptions that are similar to the proffered position; thus the proffered position is a specialty occupation because it is common in the industry to require a bachelor's degree in parallel positions amongst similar organizations.

Counsel's assertions are not persuasive. The AAO turns first to an analysis of the duties of the proffered position and the occupation(s) that includes the described duties. 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 occupation described in this matter most closely aligns with that of a marketing manager and of an advertising representative. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers of the *Handbook*:

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

Advertising managers oversee advertising and promotion staffs, which are usually 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. The *creative director* oversees the copy chief, art director, and associated staff. The media director oversees planning groups that select the communication media - for example, radio, television, newspapers, magazines, the Internet, or outdoor signs - to disseminate advertising.

In this matter, the petitioner's job description includes planning attendance at exhibitions to develop customers, making a product development schedule, developing pricing strategies while balancing firm objectives and customer satisfaction, developing marketing strategy, working with advertising and promotion managers, hiring a marketing and sales staff, selecting products and accessories to be displayed at trade shows, developing marketing kits, and conducting marketing operations, market development, price decisions, and promotion of new products. These are all duties relating to the marketing of the petitioner's products. The proffered position also includes duties relating to the advertising and promotion of the petitioner's product, such as planning and preparing advertising campaigns and promotional materials, working with customers, company officials, sales departments, and advertising agents, inspecting layouts and advertising copy and other promotional material, coordinating the activities of the sales, graphic arts, media, finance, and research departments, maintaining relations with newspapers and broadcast media, and instructing outside public relations agencies. These duties are similar to the duties of personnel in an advertising department.

The AAO acknowledges counsel's late claim on appeal that the proffered position incorporates duties of other occupations, including that of a management analyst and a graphics designer. However, the portions of the descriptions described by counsel as relating to the duties of a management analyst and a graphic designer are too vague to consider as descriptions of 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 in order to

establish that the duties are duties of a specialty occupation. In the instant matter, the general reference to duties that are similar in effect to portions of the *Handbook's* recitation of duties of a management analyst and a graphic designer is insufficient to show that the beneficiary's actual duties incorporate the theoretical and practical application of a body of highly specialized knowledge as a management analyst or as a graphic designer. Making conclusory statements regarding a portion of a lengthy description of a position, rather than defining the activities associated with the position is insufficient. 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)).

The AAO determines that the duties of the proffered position are the duties of a marketing manager. The *Handbook* discusses the educational requirements imposed on individuals who seek employment as marketing managers as follows:

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

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

* * *

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A course of study should include marketing, consumer behavior, market research, sales, communication methods, and technology, and visual arts - for example, art history and photography.

* * *

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

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner is unable to establish the proffered position as a specialty occupation under the requirements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove 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 only an individual with a degree in the specific specialty can perform the duties of the position. In reaching its decision, the AAO has reviewed Dr. ██████ opinion letter submitted to establish a degree requirement as an industry standard and the four job announcements submitted to establish that a specific degree requirement is common to the industry.

Dr. ██████ a professor at Seattle Pacific University in Seattle, Washington, bases his opinion on his academic experience in the fields of marketing and business administration and more specifically on the job description and the qualifications set out for market analysts, sales managers, and marketing managers contained in the *Handbook*. The AAO observes first that the petitioner does not assert that the position is for a market analyst or a sales manager but rather for a marketing manager and on appeal a marketing manager who is also a management analyst and a graphic designer. Second, the AAO's review of the position and the *Handbook*, while finding that the description may contain some elements of a sales manager and an advertising representative as well as that of a marketing manager, does not find that the *Handbook* reports that any of these positions require the attainment of a baccalaureate degree or higher.

Moreover, the professor does not note that the petitioner is a three-person organization, does not state the nature of the petitioner's business, and does not indicate that the petitioner's net annual income is a little over \$1,000. The professor does not indicate that he reviewed company information about the petitioner, visited the site, or interviewed the petitioner. While some marketing managerial positions may require a bachelor's degree in a specific field, Dr. ██████ does not provide sufficient details about the complexity of the duties in relation to the petitioner's business to substantiate his conclusions. There is thus an inadequate factual foundation established to support the opinion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The record establishes that the proposed duties do not exceed the scope of a typical marketing manager. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical marketing manager, a position that does not normally require a degree or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline. The opinion is not sufficiently specific to establish the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Likewise the four job announcements submitted to establish that the petitioner's degree requirement is an industry norm is not probative in this matter. Of the four job announcements submitted by the petitioner in response to the director's RFE, none appear to come from businesses that are similar to the petitioner, a manufacturer and importer of photographic processing chemicals and photo paper. Accordingly, they fail to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations. In addition, 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 job description provided for the proffered position. The petitioner has not provided probative evidence that a degree requirement for the proffered position is the industry norm as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO again acknowledges counsel's assertion on appeal that the position incorporates the duties of a management analyst and a graphic designer as well as that of a marketing manager. However the duties that

purportedly relate to the duties of a management analyst or a graphic designer are ill-defined; thus, there is insufficient information in the record to establish that a degree requirement in the industry is the normal requirement for an individual who is expected to perform those duties.

The AAO next considers the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), whether the employer normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In this matter the petitioner does not claim nor does counsel assert that the petitioner has previously hired only degreed individuals to perform the proffered position. Likewise, the record offers no evidence of the petitioner's past hiring practices to establish that the petitioner normally requires a degree or its equivalent for the proffered position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. On appeal counsel asserts that the duties of the proffered position are a combination of several occupations and that some of the duties are the duties of a specialty occupation. Counsel seems to suggest that if the beneficiary will be performing the tasks of several different occupations, the position must be a specialty occupation. The AAO disagrees.

Upon review of the duties of the proffered position, the AAO has concluded that the position is closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. That the beneficiary may be required to also perform some advertising or sales tasks as well as marketing the petitioner's product does not elevate the position to a specialty occupation. The job duties of the position do not reflect the specialization or complexity that require the individual performing the tasks to have attained a bachelor's degree or its equivalent. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the evidence submitted in support of the petition, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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