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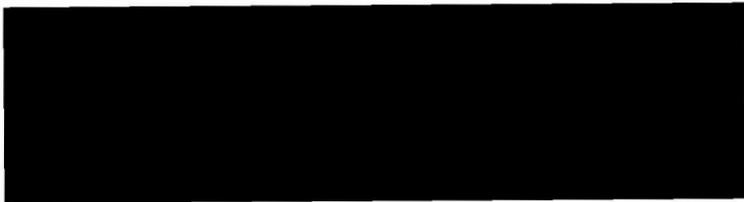
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
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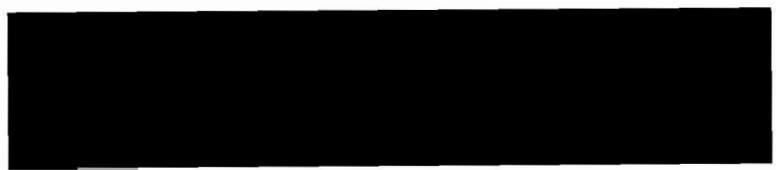


FILE: WAC 07 148 50893 Office: CALIFORNIA SERVICE CENTER Date: **AUG 21 2008**

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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner manufactures and sells surfboards, employs 17 personnel and eight independent contractors, and estimates a \$7 million gross annual income for the 2007 year. It seeks to employ the beneficiary as a public relations specialist. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 2, 2007 and supporting documentation; (2) the director's May 16, 2007 request for further evidence (RFE); (3) counsel for the petitioner's August 6, 2007 response to the director's RFE and supporting documentation; (4) the director's August 28, 2007 denial decision; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing this decision.

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.

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 seeks the beneficiary's services as a public relations representative. In a March 28, 2007 letter appended to the Form I-129, the petitioner stated:

Under the direct supervision of [the petitioner's] CEO, the Public Relations Specialist will design and execute strategies to promote Lost Surfboards products within the industry. He will work on establishing a favorable image of our company for current and future distributor clientele on local, national, and international levels. [The beneficiary] will manage and promote company events and activities designed to increase sales and overall market share in the industry.

[The beneficiary] will also work on location at one of our partnering retail distributors, The Catalyst, a well-known surfing retail store in Orange County. While on location, he will study the pattern of the retail distribution of our extensive product line, and he will strategize to promote our products in order to maximize revenue. Based on his conclusions regarding retail operations and the success of our product, he will prepare reports for management. He will also adjust our promotional strategies to ensure optimal distribution of our products.

On May 16, 2007, among other items, the director requested a more detailed description of the proposed duties of the position including the percentage of time the beneficiary would allocate to each duty. The director requested that the petitioner provide documentary evidence that the proffered position met one of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In an August 3, 2007 response, the petitioner stated: "[the beneficiary] is responsible for the design and execution of promotional strategies with the goal of increasing sales and awareness of our products," "will be charged with the responsibility of researching consumer preferences, the strengths and weaknesses of the [petitioner's] brand, and ultimately the brand's performance in various international markets in North America, Europe, and Central America," and "will then design successful PR campaigns on the basis of that research, aimed at expanding our brand recognition and, as a result, our sales." The petitioner added that the beneficiary would study retail locations to produce reports measuring the brand's performance and would devise practical guidelines that could be implemented into business strategies to promote the desired tangible outcome. The petitioner further noted that the beneficiary would be responsible for promoting the petitioner's brand at local, national, and international

levels by organizing product demonstrations and promotional events at central locations around the world. The petitioner divided the beneficiary's duties as follows:

35% - Researching and analyzing [the petitioner's] current market share in the local, national, and international markets:

- a) conducting detailed studies of past and current profits and losses, with respect to the introduction of various surfboards to the marketplace;
- b) Assessing the viability of new products in various markets and determining the correct placement, based on customer response to marketing efforts;
- c) Analyzing the impact of past promotional campaigns on variation in market share.

25% - Analyzing markets and product promotions and creating effective promotional programs featuring [the petitioner's] products through developing:

- a) Written materials promoting [the petitioner's] products;
- b) On-line content material promoting [the petitioner's] products;
- c) Video products promoting [the petitioner's] products.

20% - Organizing promotional events nationally and internationally.

15% - Meeting with management to discuss research findings, new promotional campaigns, and the implementation of findings and recommended strategies.

5% - Administrative duties, including the preparation of reports for management.

The petitioner also provided copies of ten Internet job advertisements to substantiate that a bachelor's degree is common in the industry in parallel positions among similar organizations.

On August 28, 2007, the director denied the petition. The director found that the description of the proffered position most closely resembled that of a public relations manager as reported in the Department of Labor's 2006-2007 *Occupational Outlook Handbook (Handbook)*. The director found, in part, that the *Handbook* reported that a "wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs," and that the *Handbook* did not specify a bachelor's degree in a specific specialty as the minimum requirement for entry into the occupation. Upon review of the job advertisements submitted, the director determined that the listings did not provide sufficient information to demonstrate that the advertised positions were parallel positions in organizations similar to the petitioner. The director also noted that the majority of the ten advertisements although listing a bachelor's degree did not specify a required field of study. The director concluded that the petitioner had not established that a degree requirement is common to the industry in parallel positions among similar organizations. The director did not find any of the duties described by the petitioner to include duties that were either complex or unique so that only an individual with a degree in a specific specialty could perform them. The director did not find evidence in the record substantiating that the petitioner normally required applicants for the position to possess a baccalaureate or higher degree in a specialized field of study. The director further determined that the evidence submitted failed to distinguish the difference in the duties to be performed by the beneficiary in the proffered position with those duties normally performed by a

public relations manager or described how the duties to be performed were more specialized or complex. The director concluded that the record did not contain evidence that the proffered position met any of the criteria for a specialty occupation. The director also noted two discrepancies in the record regarding the petitioner's number of employees and its reported gross annual income.

On appeal, counsel for the petitioner clarified the two perceived discrepancies in the record. In addition, counsel acknowledged that the job description the petitioner provided included the duties of a marketing manager as that occupation is reported in the *Handbook*, under the title *Advertising, Marketing, Promotions, Public Relations, and Sales Managers*, the section of the *Handbook* used by the director when analyzing the proffered position. Counsel requested that the proffered position be evaluated under the *Handbook's* report on marketing managers. Counsel acknowledges that the *Handbook* reports that a wide range of educational backgrounds is suitable for the various occupations listed under the overall classification of *Advertising, Marketing, Promotions, Public Relations, and Sales Managers* and that "wide range" refers to educational fields and not levels of education. Counsel asserts that when properly interpreted, the *Handbook* notes that some employers prefer a bachelor's or master's degree in business administration while other employers prefer a bachelor's or master's degree in another business-related field; but that the *Handbook* does not state that an educational background less than a bachelor's degree would be suitable for the occupation of a marketing manager.

The AAO first turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent in a specific discipline is the normal minimum requirement for entry into the particular position. The AAO routinely relies on the *Handbook* for the educational requirements of particular occupations. In addition, the *Handbook's* discussion of occupations assists in analyzing the duties of a particular position and determining the corresponding occupation. Upon review of the *Handbook's* discussion of public relations specialists and the several occupations discussed in the *Advertising, Marketing, Promotions, Public Relations, and Sales Managers* classification, the AAO agrees that based on the duties of the position, the position proffered by the petitioner corresponds most closely to a marketing and promotions manager. For example, the beneficiary's responsibilities for designing and executing promotional strategies with the goal of increasing sales and awareness of the petitioner's products, researching consumer preferences and the strengths and weaknesses of the petitioner's brand, and designing successful public relations campaigns on the basis of that research to expand brand recognition and sales overlap with the *Handbook's* general discussion of marketing managers and promotion managers. Thus, the type of occupation the beneficiary would be performing is discussed in the *Handbook's Advertising, Marketing, Promotions, Public Relations, and Sales Managers* classification and is not in dispute. Neither is the *Handbook's* discussion of the training and education required to perform the duties of these occupations. The *Handbook* reports: "[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," and that:

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, management, economics, accounting, finance, mathematics, and statistics are advantageous. Additionally, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and electronics manufacturing, a

bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

The AAO finds that counsel's acknowledgement that a "wide range" of educational fields is suitable to perform the duties of the occupation of a marketing/promotions position is an acknowledgement that the position is not a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). The AAO reiterates that CIS interprets the term "degree" to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. It is the lack of a definitive discipline and the recognition that a wide range of educational backgrounds at the bachelor's level is sufficient and appropriate to perform the duties of a marketing/promotions position that weakens counsel's assertion that the proffered position is a specialty occupation under this criterion. While the *Handbook* discusses both the types of degrees that may prepare individuals to seek employment in marketing/promotions positions and the degree preferences of certain employers when seeking individuals for these occupations, it does not indicate that a baccalaureate or higher degree, or its equivalent, in a specific discipline is normally the minimum requirement for entry into the occupation. The fact that many individuals who seek employment in marketing/promotions positions have bachelor's degrees in related fields and that some employers prefer to hire such individuals for these positions does not satisfy the degree requirement set forth in the first criterion. Employer preference is not synonymous with the "normally required" language of the criterion. When a job, like that of a marketing/promotions position, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The marketing/promotions occupation, as described, does not qualify as a specialty occupation as the evidence presented does not require that a baccalaureate or higher degree or its equivalent in a specific discipline is the normal minimum requirement for entry into the particular position. The petitioner has not established that the proffered position as described is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO has also reviewed the advisory opinion of [REDACTED] who is on the Board of Directors of Surf Industry Manufacturers Association (SIMA), a professional association. Mr. [REDACTED] opines: "[a] bachelor's degree in business or a related discipline is the standard educational requirement for a position in public relations, or other promotional or marketing positions in the surf manufacturing industry." Mr. [REDACTED] indicates that it is the nature of the industry that requires surf companies to promote and market their brands in a meticulous and methodical fashion in order to succeed in the highly competitive environment and that this type of marketing and promotion can only be accomplished with an understanding of the intricacies of business and marketing concepts attained at least at a bachelor's degree level in business or a related field. The AAO finds that Mr. [REDACTED] has not supported his opinion with objective documentary evidence. Going on the 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 190 (Reg. Comm. 1972)). Mr. [REDACTED] does not provide evidence of objective surveys regarding the national hiring standards of organizations similar to the petitioner; nor does Mr. [REDACTED] provide other documentary evidence substantiating his opinion that companies seeking to hire a marketing and/or promotions manager require candidates to have at least a bachelor's degree in a discipline of specific title and training. The *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. Mr.

opinion is insufficient to overcome the *Handbook's* indication that not all marketing/promotions positions require a specific bachelor's degree. 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). Mr. [REDACTED]'s opinion does not establish that the proffered position is a specialty occupation or otherwise satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO now turns to a consideration of whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. Counsel submits letters from three companies¹ involved in selling surfing apparel and surfing accessories. Each letter-writer indicates that the duties of a public relations and marketing position in his company would require a bachelor's degree in business or another relevant field and that a bachelor's degree is an industry standard for a marketing/public relations position. Counsel also provides an additional 14 job announcements for positions in the marketing and public relations field that list bachelor's degrees in marketing, in business, in communications, or related fields as a requirement for the various positions advertised.

The AAO has reviewed the job announcements submitted in response to the RFE and on appeal and determines that the job announcements do not provide sufficient information to enable the AAO to conclude that the businesses advertising the positions are similar to the petitioner in size, number of employees, or level of business. Again, going on the 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 AAO reviews the specific job requirements of each proffered position in relation to the petitioner's specific business operations when assessing whether the position is parallel to similar organizations within the petitioner's industry. In this matter, it is not. Specifically, the AAO finds that the job postings submitted provide a broad overview of the various responsibilities associated with the various positions advertised. Moreover, neither counsel nor the petitioner has attempted to explain how the requirements of the disparate companies advertising for the positions are similar to this particular petitioner. Further, the job announcements confirm that a general degree in business or degrees in a wide range of disciplines is sufficient to perform the duties of a public relations representative or a marketing specialist. The job advertisements provided are insufficient to demonstrate the proffered position is a specialty occupation as established by an industry-wide standard.

The AAO has also reviewed the letters submitted from other companies in the petitioner's industry. The letters do not identify specific employees who perform the detailed and similar job duties as the proffered position, nor identify the actual degrees of the individuals performing those job duties. Thus, the record does not contain adequate evidence demonstrating that surfing manufacturers "routinely employ and recruit only degreed individuals," in a specific discipline to perform a position parallel to the proffered position. The petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

¹ The opinion letter of Joel Cooper also serves as an industry letter as Mr. [REDACTED] is the founder and president of a surfing apparel line.

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. A review of the evidence of record finds it insufficient to establish that the duties of a marketing/promotions position are distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. As observed above, the *Handbook* does not report that a degree is required noting only that a college education is excellent preparation for a career in public relations and that some employers prefer that applicants have a bachelor's or master's degree in business administration with an emphasis on marketing or experience in a field related to the firm's business. The petitioner has not provided evidence that the occupation of a marketing/promotions specialist is so unique and complex that only an individual with a degree in a specific discipline can perform the duties associated with the position. Accordingly, the petitioner has not established the occupation as a specialty occupation under either of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

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. 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 to assist in establishing this criterion. Although the petitioner indicates it has been in business since 1992, it has not provided any evidence that it has previously employed an individual in a marketing/promotions position. The AAO notes the petitioner's stated policy to hire only individuals with a bachelor's degree for the proffered position; however, such a policy does not establish that the position is a specialty occupation. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. Accordingly, the AAO finds that the petitioner has not provided evidence that establishes the proffered position is a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), whether 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. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. The petitioner in this matter has provided sufficient information when describing the position in response to the director's RFE, as well as clarifying the requirement that the beneficiary would also be required to analyze particular studies on appeal. The petitioner in this matter through counsel, the descriptions provided, and the evidence on appeal has provided sufficient independent and documentary evidence to establish that this particular position as it relates to the petitioner's specific business is so specialized and complex that is usually associated with the attainment of a baccalaureate or higher degree in a specific discipline. It is the requirement that the individual in the proffered position analyze precise data in prepared studies which include the petitioner that underscores that 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 in a

specific discipline. The AAO finds that the petitioner's particular business, its role in the surfing industry, and the market analysis needed to retain its position in the industry presents a unique combination of jobs that would require the beneficiary to have a skill set not normally possessed by an ordinary marketing/promotions specialist. As a result, the AAO concludes that the petitioner has established that its proffered position meets the specialized and complex threshold of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The record reflects that the beneficiary graduated from the University of Southern California Santa Cruz with a bachelor's degree in business management economics. Thus, the beneficiary is qualified to perform the services of a specialty occupation.

The petition will be approved. As always, 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 met that burden.

ORDER: The appeal is sustained. The petition is approved.