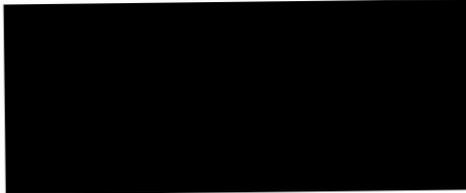




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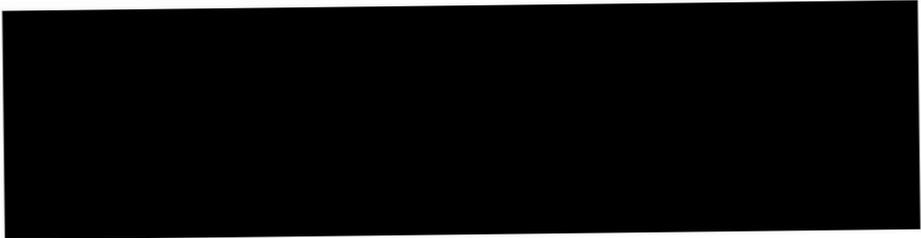
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FILE: WAC 04 245 52184 Office: CALIFORNIA SERVICE CENTER Date: **OCT 20 2006**

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:** The director of the 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 is a company that imports and manufactures gourmet foods and food accessories. The petitioner seeks to employ the beneficiary as a marketing manager, and endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition based on a determination that the proffered position was not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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 (5<sup>th</sup> 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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence; (3) the petitioner’s response to the director’s request; (4) the director’s denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a marketing manager. Evidence of the beneficiary’s duties includes: the Form I-129; the attachments accompanying the Form I-129; the August 30, 2004, company support letter; and the petitioner’s March 16, 2005, response to the director’s request for evidence. According to this evidence, the beneficiary would perform the following duties:

- Oversee and participate in the planning and administration of marketing plans designed to foster and promote patronage;
- Determine the demand for company products and services in order to identify potential customers;
- Develop pricing strategies to maximize the company’s profits and share of the marketplace while ensuring client satisfaction;
- Monitor industry trends in order to determine the need for additional products and services;
- Plan and prepare advertising and promotional materials;
- Arrange for promotional programs through use of selected media;
- Coordinate domestic and international sales missions;
- Review trade and consumer publications to monitor consumer trends and competitive property activity.

The petitioner stated that, “[t]he percentage of time the Beneficiary will spend on each of the outlined above duties on a daily basis will vary with each day’s business needs.” The petitioner indicated further that its marketing manager position requires a baccalaureate degree in a field related to the specialty, and that the

beneficiary has the equivalent of a U.S. bachelor's degree in business administration with a concentration in marketing, and is thus qualified to perform the proffered position duties.

The director determined that the proffered position was not a specialty occupation. Referring to the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that employers prefer, but do not require, a bachelor's degree in a specific specialty for marketing, promotions, and sales manager jobs. The director found further that the submitted job postings were unconvincing in establishing that a bachelor's degree in a particular field is the industry-wide standard. The director did not address the evidentiary value of the expert opinion letter submitted by the petitioner.

As previously noted, in determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns first to the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

On pages 27-28 of the *Handbook* (2006-2007 Edition), the *Handbook* describes advertising, marketing, promotions, public relations and sales manager positions, and states in pertinent part that:

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 determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets . . . . Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits 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 . . . .

In the present matter, the record contains no evidence to establish or indicate that the beneficiary would work with subordinates, including product development managers and market research managers, or that the beneficiary would collaborate with sales, product development, or advertising and promotion managers. Moreover, there is no evidence in the record to establish that any of the above mentioned subordinate positions exist in the petitioner's company, and the job description for the proffered position does not discuss collaboration with a sales product or marketing related team within the company. To the contrary, the information contained in the petitioner's Form I-129, reflects that the petitioner's company employs only four independent contractors and has no employees. The record contains no information regarding the position titles or duties of the four independent contractors, and the record does not contain any other information relating to the organizational structure of the petitioner's company. Accordingly, the AAO finds that the petitioner has failed to establish that the proffered position duties establish that the position qualifies as a marketing manager position. Moreover, even if the proffered position were that of a marketing manager, the petitioner has failed to establish that the position qualifies as a specialty occupation, for the reasons set forth below.

The *Handbook* discusses on pages 28-29, the general educational requirements imposed on individuals who seek employment within the marketing manager profession, and states in pertinent part that:

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 . . . .

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 . . . .

The *Handbook* provides no specific degree requirement for employment as a marketing manager. Accordingly, the AAO concludes that performance of a marketing manager's duties would not require the beneficiary to hold a baccalaureate or higher degree in a related field.

Counsel asserts that the *Handbook* should not be used as an exclusive guide for determining job-related educational requirements. Counsel notes that DOL rules and regulations, as they relate to the “PERM” program, and as set forth in *Federal Register*, Vol. 69, No. 247 at Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004), have classified a marketing manager position as requiring a bachelor’s degree. Counsel asserts further that an expert opinion letter, and marketing manager job announcements contained in the record further establish that the duties and nature of the proffered position require the theoretical and practical application of knowledge which is obtained through attainment of a bachelor’s degree in business/marketing.

The AAO agrees that it must fully consider a petitioner’s evidence in order to determine whether the record establishes that the proffered position is a specialty occupation. The AAO appropriately reviews the evidence about the occupation in light of the *Handbook*, which serves as an authoritative, reliable and detailed source of information about the duties and educational requirements of a particular occupation.

Counsel asserts that DOL rules and regulations as they relate to the “PERM” program, and as set forth in the *Federal Register*, Vol. 69, No. 247 at Appendix A to the Preamble-Professional Recruitment Occupations-Education and Training Categories at 77377 (December 27, 2004), classify a marketing manager position as requiring a bachelor’s degree. While the *Federal Register* section referred to by counsel does indicate that a marketing manager position requires a bachelor’s degree or higher, the degree subject is not specified. As noted previously, in order to be classified as a specialty occupation, the position must require a degree in a specialty. When a degree of generalized title or a range of degrees would be acceptable, the position may not be classified as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). In addition, the *Federal Register* information states at 77332 that, “[i]n administering this final rule, the *Dictionary of Occupational Titles* (DOT) will no longer be consulted to determine whether the training and experience requirements are normal; *O\*NET* [Occupational Information Network] will be used instead.” With regards to the position of marketing manager, *O\*NET* provides at <http://online.onetcenter.org/link/summary/11-2021.00>, that marketing managers:

Determine the demand for products and services offered by a firm and its competitors and identify potential customers. Develop pricing strategies with the goal of maximizing the firm’s profits or share of the market while ensuring the firm’s customers are satisfied. Oversee product development or monitor trends that indicate the need for new products and services.

Sample of reported job titles: Marketing Manager, Marketing Director, Business Development Manager, Marketing Coordinator, Account Supervisor, Commercial Lines Manager, Commercial Marketing Specialist.

Overall Experience A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. . . .

Education Most of these occupations require a four-year bachelor's degree, but some do not.

The AAO notes that the *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the marketing manager occupation. The *O\*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *O\*NET* relies on the specific vocational preparation (SVP) rating, which is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not specify the particular type of degree, if any, that a position would require. Furthermore, the information contained in *O\*NET* reflects that an individual may perform the duties of a marketing manager with less than a bachelor's degree. The AAO is therefore not persuaded by counsel's claim that the proffered position is a specialty occupation because of the cited appendix to the PERM rule.

The *Handbook* also reveals that a wide range of educational backgrounds is acceptable for entry into marketing manager positions. Counsel maintains, however, that an expert opinion letter from [REDACTED] Ph.D., Associate Professor of Management Science at the University of Maryland, states and establishes that in order to perform the duties of a marketing manager the beneficiary must possess core skills and competencies that are gained from obtaining a bachelor's degree in business administration with a concentration in marketing or a related field.

The AAO finds that, while relevant to these proceedings, the opinion letter contained in the record is unsupported by independent evidence substantiating the author's opinion. CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In the present matter, [REDACTED] provides a copy of his resume and states that his opinion is based on extensive experience. No other independent evidence of his expertise, or authority supporting the opinion such as surveys, industry data or other publications, is provided however, and simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The professor additionally does not indicate that he reviewed the position duties in the context of the petitioner's business operations. He thus laid an inadequate factual foundation for his opinion. Furthermore, the professor's opinion is in conflict with the *Handbook*, which is a compilation of data gathered from industry sources by DOL.

Based on the evidentiary record, the petitioner has thus failed to establish that a baccalaureate or higher degree, or its equivalent in a specific specialty is the normal minimum requirement for entry into the marketing manager position, as required by 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish its proffered position as a specialty occupation under the second criterion, the 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 it can be performed only by an

individual with a degree in the specific specialty. To establish its degree requirement as an industry norm, the petitioner has submitted six “Monster.com” internet job advertisements for market manager positions, as well as the previously discussed expert opinion letter by [REDACTED]. The AAO finds that this evidence fails to establish the petitioner’s degree requirement as the norm within its industry.

Of the six job announcements submitted by the petitioner, none appear to come from businesses that are similar to the petitioner, an importer and manufacturer of gourmet foods and food accessories that employs four independent contractors and no employees. Moreover, the job duties contained in the six announcements all include interacting with multiple intra-company sales and marketing related departments and teams, in order to develop marketing policy, plans and programs. Furthermore, half of the job announcements submitted require only a generalized bachelor’s degree, or a degree in a field other than marketing or a related field.

The petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates, supra.*

Furthermore, as discussed above, the expert opinion letter which concluded that a baccalaureate degree in a directly related field is required for employment as a marketing manager also fails to establish that a degree requirement is common within the petitioner’s industry. Accordingly, the petitioner has failed to satisfy the second criterion’s condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner’s ability to meet the third criterion, CIS often reviews the petitioner’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 the present matter, the petitioner asserts that the company’s president, a degree holder, previously performed the proffered position’s duties, and that the company now requires a separate marketing manager due to company expansion. The petitioner provided no evidence of the degree held by the company president, and the record contains no evidence to establish that the company president possesses a baccalaureate or higher degree in a specific specialty that is directly related to the proffered position. Moreover, the petitioner failed to establish that a marketing manager position previously existed as a separate position within the petitioner’s company. No other evidence was provided with regard to the petitioner’s previous hiring practices in similar positions. Accordingly, the petitioner has failed to establish that the petitioner’s normal hiring practice is to require the minimum of a baccalaureate degree 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. As previously discussed the AAO does not find that the duties described by the petitioner reflect the need for a higher degree of knowledge and skill than would normally be required of marketing managers. The AAO, therefore concludes that the petitioner has failed to establish that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

It is noted that the record reflects that the beneficiary was previously granted H-1B nonimmigrant visa status, for different employers, between: October 1, 1999 - July 1, 2002; January 11, 2001 - November 1, 2001; and August 11, 2003 - August 11, 2006. The present record of proceeding does not reflect the occupational basis of the previous H-1B approvals, nor does the record contain the supporting evidence submitted to the service center in the prior cases. Accordingly, the AAO is unable to determine whether the positions offered in the prior cases were similar to the proffered position in the present matter. The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is thus limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the previous cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. It is noted, however, that if the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of the prior petitions would have been erroneous.

In the present matter, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 its burden. The appeal will therefore be dismissed and the petition will be denied.

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