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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

MAY 19 2004

FILE: SRC 02 095 52471 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The petitioner submitted a motion to reopen and reconsider on October 28, 2002, and an appeal from the director's decision on December 9, 2002, respectively. The director subsequently dismissed both actions, describing both as motions. 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 has a bagel shop business. It seeks to employ the beneficiary as a marketing manager. The petitioner, therefore, 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 director denied the petition because the proffered position is not a specialty occupation, and the beneficiary did not appear qualified to perform the duties of the position. The director also questioned the identification of the petitioner's business. On appeal, counsel asserts that the position is a specialty occupation, the beneficiary is qualified to perform the duties of the position. Counsel also points out that companies may identify themselves as doing business under another name.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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.

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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support dated January 21, 2002; (3) the director's request for additional evidence; (4) counsel's letter, dated July 11, 2002, that responds to the director's request; (5) the director's denial letter, dated September 24, 2002; (6) the petitioner's motion to reopen and reconsider dated October 21, 2002; (7) the director's dismissal of the motion dated November 18, 2002; (8) Form I-1290B dated December 9, 2002 which the director identified as a second motion to reopen; (9) the director's dismissal of petitioner's appeal/motion on March 17, 2003; and (10) Form I-290B and supporting documentation, received by the service center on April 14, 2003. 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 I-129 petition; the director's request for further evidence; and the petitioner's letters in support of the petition and in response to the director's request for further evidence. According to the initial petition, the beneficiary would gather market research data to implement a marketing plan to increase the petitioner's market share in the wholesale distribution of bagels. The beneficiary would also be responsible for data analysis and the preparation of reports to management, as well as be responsible for the petitioner's marketing division, and ensure that all research is conducted properly.

In the petitioner's response to the director's request for further evidence, the petitioner further explained that the beneficiary would research market conditions locally and regionally to determine potential sales of the petitioner's products and services in both the wholesale and retail bagel industry. The beneficiary would establish research methodology and format for data gathering, such as surveys, polls, or questionnaires. The beneficiary would also examine and analyze statistical data to forecast future marketing trends, and gather data on the petitioner's competitors. The petitioner also indicated that the beneficiary would supervise one sales person. The petitioner indicated in its letter of support that the position required a baccalaureate degree in business administration.

In his denial of the petition, the director found that the petitioner had not established that it was a U.S. employer because it identified itself as a company doing business under the name of another company for which CIS did not have sufficient documentation. Further, the director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of marketing manager and noted that a wide range of educational backgrounds were suitable for entry into marketing managerial jobs. He then determined that the proffered position was not a specialty occupation because the job did not require a baccalaureate degree in a specific specialty. Finally, the director noted that the evaluator of the beneficiary's educational and professional work experience did not appear to have the authority to grant college-level credit for training and/or work experience, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the proffered position is a specialty occupation as a marketing manager position requires the equivalent of a bachelor's degree in marketing and also requires the ability to apply practical and theoretical knowledge. Counsel asserts that the beneficiary has the ability to perform the duties of the position through her years of work experience in the field of marketing. Counsel also asserts that, according to regulations, the successful completion of the College Level Examination Program (CLEP) exam authorizes Dr. Clarke to evaluate the beneficiary's education and work experience. Counsel also states that Gourmet Ventures is a registered corporation doing business as Outrageous Bagel Company. Finally counsel asserts

that small business owners can require a bachelor's degree for managerial jobs such as the proffered position. Counsel does not submit further documentation to substantiate these assertions.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria 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; 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 often considered by CIS when determining these criteria include: whether the *Handbook* 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the proffered position of marketing manager, the record is not clear as to whether the proffered position is that of marketing manager with responsibility for a marketing division. For example, the petitioner has indicated that the beneficiary will supervise one sales person. In addition, the organizational chart for the petitioner does not reflect any existing marketing staff. The record is also devoid of any information as to marketing research personnel or activities of the petitioner's parent company. In addition, while it is correct that businesses of any size or business volume may require their staff to have bachelor's degrees, the overriding consideration for the H-1B adjudications is whether employers require a baccalaureate degree in a specific specialty. As the *Handbook* indicates, a wide range of educational backgrounds in combination with work experiences can be suitable for positions such as marketing manager. Thus, the *Handbook* does not establish that a baccalaureate degree in a specific specialty is required for entry into the proffered position. Without more persuasive evidence, the petitioner has not established that a baccalaureate degree in a specific specialty is required for entry into the proffered position.

With regard to parallel positions in similar healthcare settings, the petitioner submitted no further documentation on marketing managers employed in similar wholesale and retail food sales systems. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. The petitioner stated in its letter of support that no one currently worked as a marketing manager, other than the owner of the business. However, the petitioner did not provide any documentary evidence as to the academic credentials of the owner that could establish that individuals currently or previously performing the duties of the position have a baccalaureate degree in a specific specialty. Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(*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. To the extent that they are depicted in the record, the duties of the position appear routine to any sales or marketing position. In addition, the record is devoid of any information on the petitioner's present business volume or marketing strategies in the wholesale or retail sale of bagels that could further illustrate the complexity of the petitioner's present or future marketing endeavors. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the petitioner has not established that the proffered position is a specialty occupation.

With regard to the beneficiary's qualifications to perform the duties of the proffered position, the petitioner did not submit any documentary evidence as to any foreign educational credentials that the beneficiary may have acquired. Therefore, it appears that the beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In its response to the director's request for further evidence, counsel submitted an evaluation document from the American Evaluation Institute, Long Beach, California. The evaluator is identified as Dr. Mathew B. Michael Clark, directing evaluator. Dr. Clark determined that the beneficiary's twenty years of marketing sales in Argentina was equivalent to a bachelor of science degree in marketing. Dr. Clark provided no explanation of how he made his determination, how he determined that the beneficiary had worked for twenty years in sales marketing, or what materials he consulted in reaching his determination. This document is viewed as very problematic. If Dr. Clark is an evaluator for the American Evaluation Institute, which appears to be a credentials evaluation service, it should be noted that Dr. Clark can only evaluate the educational credentials of the beneficiary. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(*3*). Thus, the evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). In addition, the documentation submitted by the petitioner with regard to Dr. Clark's ability to serve as a test administrator for a U.S. Department of Education program has no relevancy to the regulatory criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(*2*). This criterion refers to the beneficiary having passed recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), as an alternative way of judging the equivalency of her work experience to actual college credits. Thus, the petitioner has not established that the beneficiary's work experience is the equivalent to a baccalaureate degree in marketing from an accredited U.S. educational institution.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation[1];

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

[1] *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Upon a review of the record, the only documentary evidence submitted by the petitioner with regard to the beneficiary's previous work experience is a letter from Luis Ruben Abadi, president, Runaway Jeans and Sportswear. This letter states that the beneficiary worked for fourteen years as marketing manager for Runaway Jeans and Sportswear, and that she also provided consulting services for other small and mid-size companies. As described by the employer, the beneficiary's duties did appear to involve the theoretical and practical application of marketing practices and concepts. However, the letter does not establish that the beneficiary was involved in progressively more responsible job duties over her fourteen years of work, or that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation. Finally, there is insufficient evidence that the beneficiary has recognition of expertise in her field. Thus the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of the proffered position. 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.