U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 04 240 53211 Office: CALIFORNIA SERVICE CENTER Date: JAN [illegible]

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)

PUBLIC COPY

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

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DISCUSSION: The service center director 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 an importer, distributor and marketer of hardwood flooring that seeks to employ the beneficiary as a marketing director. 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 director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(l) of 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 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 director. Evidence of the beneficiary's duties includes the I-129 petition and the petitioner's August 2, 2004 letter in support of the petition. According to this evidence, the beneficiary would perform duties that entail: managing inside and outside sales staff; coordinating shipments in and out of San Francisco; assisting with the importation of products from Europe and South America into Northern California and Hawaii; assisting with purchasing in Europe using foreign language skills; promoting the petitioner's brand and educating architects and designers about the product; providing product knowledge classes for all types of clientele; creating and assisting with purchasing levels; maintaining inventory levels; and creating and monitoring the marketing budget for Northern California and Hawaii. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in a business-related field.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook* (*Handbook*), the director noted that the minimum requirement for entry into a position as a marketing manager was not a baccalaureate degree or its equivalent in a specific specialty. 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 petitioner established that the position's duties are so complex that an individual must have a bachelor's degree to perform them, and that the position includes many skills not included in the *Handbook's* description of a marketing manager. In addition, counsel states that since the director did not issue a request for additional evidence, the director did not consider all available evidence establishing that both the petitioner and others in the industry require employees performing the duties of the proffered position to have a degree in a business-related field. Finally, counsel asserts that the *Handbook* supports the petitioner's contention that the duties of the proffered position require a bachelor's degree.

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 2004-2005 edition of the *Handbook* describes educational requirements for entry into the sales manager or marketing manager field:

> 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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.
>
> 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.

Counsel asserts that the *Handbook* supports the petitioner's claim that a degree is required for the proffered position. However, the *Handbook* clearly states that there is no requirement for a degree *in a specific specialty* for entry into this field. A wide range of areas of study would be appropriate preparation for a position as a sales and marketing manager, with only "some" employers preferring a specific specialty.

On appeal, counsel states that the duties of the proffered position include not just those of a marketing manager, but also those of a market research analyst and an industrial production manager. Counsel states that the beneficiary is currently performing these duties for the petitioner. Counsel states on appeal that the beneficiary uses marketing data, monitors industry trends, analyzes the competition and advises the petitioner regarding pricing strategies and consumer demand in order to forecast future sales and market trends as well as product lines and areas for expansion. In addition, counsel states that the beneficiary has been monitoring product standards, inspecting samples of finished goods, recording defects and statistically analyzing quality control problems. None of these duties were included in the position description submitted with the initial petition. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). As such, the decision will be based on the facts before the director, not those presented for the first time upon appeal.

The petitioner did not submit evidence regarding parallel positions in the petitioner's industry or any evidence from professional associations regarding an industry standard. On appeal, counsel submits an affidavit from the petitioner's vice-president, which states that in his 20 years of experience in the flooring industry he has seen that individuals performing the duties of the proffered position hold a bachelor's degree or higher in a business field. He also states that the petitioner requires such an individual to hold a bachelor's degree in business or marketing, and that all of the petitioner's employees except one warehouse employee possess a bachelor's degree. While the author of the letter can speak to the situation within his own company, he cannot be considered a recognized authority according to the regulations. A 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).

Counsel also submits a letter from a business affiliate of the petitioner, which is the exclusive representative of the petitioner's product lines. The beneficiary is placed with the affiliate to oversee the petitioner's West coast operations. The author of the letter asserts that the scope of the beneficiary's work and responsibilities is much more varied than the title "marketing director" indicates. She also states, "[A] bachelor's degree in business is strongly recommended" for the proffered position. She does not state that the position requires a degree, or that the industry standard is for individuals in positions similar to the proffered position possess a degree. The author also states that a timber company for which she is the general manager is currently seeking sales representatives to perform a portion of the duties of the proffered position, and the company requires a business degree with a specialty in finance or marketing. No evidence was submitted to support this statement, however. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this case, the opinions are not in accord with the information in the *Handbook*. 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. On appeal, the petitioner's vice president states that the company requires such an individual in the proffered position to hold a bachelor's degree in business or marketing, and that all of the petitioner's employees except one warehouse employee possess a bachelor's degree. No evidence was submitted to support this statement, nor does the petitioner indicate that its employees' degrees are in specific areas directly related to their positions. While the beneficiary is currently filling the proffered position, it would be tautological to state that because he possesses the degree requested, it establishes that the position requires that degree. As this was a new position prior to the beneficiary filling it, the petitioner is not able to establish that it "normally" requires a degree for the position.

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 do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, 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.