

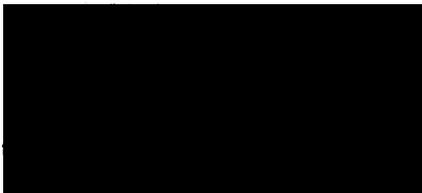


U.S. Citizenship
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FILE: WAC 04 065 50230 Office: CALIFORNIA SERVICE CENTER Date: JUN 15 2005

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, Director
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 an importer and exporter of Japanese cosmetics. It seeks to employ the beneficiary as a marketing analyst. 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. 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.

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 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 analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's responses to the director's requests for evidence. According to this evidence, the beneficiary would perform duties that entail identifying target market segments and market opportunities through extensive research and analysis; advising management on the development, implementation, and tracking of marketing programs; conceptualizing promotions for products and developing marketing initiatives via advertisements, direct mail, the Internet, and sales promotions; preparing marketing reports and statistical information; forming business alliances; creating sales channels and participating in pricing decisions and product development; developing, maintaining, and expanding contacts and client lists; writing advertisements and promotional copies; participating in promoting trade shows and implementing marketing campaigns; working with staff to promote integrated marketing programs in order to maximize sales and meet marketing goals; creating and nurturing media outlets and contacts; developing promotional content for commercial websites; refining the business model; coordinating with design companies and graphic designers to create promotional materials such as catalogs, brochures, and flyers; communicating product, marketing, and service ideas to clients; and collaborating with management to ensure consistency with company objectives. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree or its equivalent in marketing or a related business field.

The director determined that the proffered position was not a specialty occupation. Referring to the Department of Labor's (DOL)'s *Occupational Outlook Handbook* (the *Handbook*), the director stated that it shows that a marketing analyst is typically employed by large companies, such as banks, worldwide corporations, or economic and marketing research firms. Consequently, the director determined that a company such as the petitioner, with five employees and a gross annual income of \$803,743, would not require the services of a full-time marketing research analyst. The director found the submitted evidence about two companies insufficient to establish that the degree requirement is common to the industry in parallel positions among similar organizations, and determined that the petitioner did not provide evidence, such as the employment history of its employees, that would show that the petitioner normally requires a degree or its equivalent for the proposed position.

On appeal, counsel states that the petitioner is similar in nature to Pure Skin, Inc., which is a small company that imports and exports cosmetic products internationally and employs a marketing analyst. Counsel submits a declaration that describes the nature of Pure Skin, Inc. Counsel asserts that the previously submitted letters from cosmetic companies and the job posting from L'Oreal reveal that cosmetic companies require the services of a market research analyst to perform duties such as projecting future profitability, deciding which products to export, and understanding foreign markets and business and fashion trends. Counsel states that the petitioner is similar to L'Oreal because both companies promote their products to local and foreign customers and maintain and update the saleable and non-saleable forecast. Counsel also submits a job posting from Nextsport to show that a similar sized company as the petitioner requires the services of a market analyst. Counsel states that the proposed position involves analyzing a foreign business company prospectus,

projecting profitability, minimizing production and operation costs in foreign and U.S. markets, advertising, and overseeing the retailing of cosmetic products. These duties, counsel maintains, entail market analysis and require a candidate who is trained in marketing. According to counsel, because the petitioner was in its early stage of development it did not employ a market analyst. Counsel emphasizes that the beneficiary is qualified for the proposed position.

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 first considers 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

On appeal, counsel asserts that the beneficiary will analyze a foreign business company prospectus, project profitability, and minimize production and operation costs in foreign and U.S. markets. However, no evidence in the record shows that the beneficiary will perform these duties. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The duties of the proposed position resemble those of a marketing manager, which the *Handbook* describes as follows:

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—for example, business firms, wholesalers, retailers, government, or the general public. 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.

Similar to the beneficiary who will identify market segments and market opportunities; advise management on marketing programs; conceptualize promotions for products; prepare marketing reports and statistical information; form business alliances; create sales channels and participate in pricing decisions and product development; handle contacts, client lists, and media outlets; write advertisements and promotional copies; participate in promoting trade shows and implementing marketing campaigns; develop promotional content for commercial websites; coordinate with design companies and graphic designers to create promotional materials such as catalogs, brochures, and flyers; communicate product, marketing, and service ideas to clients; and collaborate with management to ensure consistency with company objectives, a marketing manager is described in the *Handbook* as an occupation that develops a firm's marketing strategy, determines the demand for products, identifies potential markets, develops pricing strategy, monitors trends that indicate the need for new products, oversees product development, and works with others to promote products and to attract potential users.

The *Handbook* reveals that employers find a wide range of educational backgrounds suitable for entry into a marketing manager job; that many prefer those with experience in related occupations plus a broad liberal arts background; and that some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing.

For a position to qualify as a specialty occupation, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) indicates that a baccalaureate or higher degree or its equivalent in a specific specialty must normally be the minimum requirement for entry into the particular position. Based on the *Handbook's* information this cannot be established since some employers prefer, though they do not require, a baccalaureate degree in specific specialties. A preference of some employers is not enough to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

For various reasons, the submitted postings, letters, and declaration of [REDACTED] fail to persuasively establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). L'Oreal's posting states that the employer requires a bachelor's degree, though not in a specific specialty, for its analyst. The duties in the Nextsport posting are similar to the proposed position. However, Nextsport is a start-up manufacturer and distributor of sports products. Since the petitioner, an importer and exporter of Japanese cosmetics, does not engage in manufacturing, it differs in nature from Nextsport. The letters from ALKAM International Inc. and Hair Image Inc. state that they employ a marketing analyst with a bachelor's degree in marketing. ALKAM International Inc. is a manufacturer and distributor of personal care, health, beauty, and wellness products and Hair Image Inc. is a hair design, beauty, and skincare distribution company. Since the petitioner does not engage in manufacturing or hair design, it differs in nature from these companies. The declaration of [REDACTED] an Internet cosmetics company, used the services of a person holding a bachelor's degree in business administration to perform marketing and establish a business plan. This

educational requirement is not enough to establish that the proposed position qualifies as a specialty occupation. As stated by the court in *Matter of Michael Hertz Assocs.*, 19 I&N Dec. 558, 560 (Comm. 1988), for a position to qualify as a specialty occupation:

A petitioner must establish that the position realistically requires knowledge, both theoretical and applied, which is almost exclusively obtained through studies at an institution of higher learning. The depth of knowledge and length of studies required are best typified by a degree granted by such institution at the baccalaureate level. It must be demonstrated that the position requires a precise and specific course of study which 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 of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility.

Because the person providing services to Pure Skin, Inc. held a baccalaureate degree of generalized title, business administration, without indicating further specification, this evidence is inadequate to establish that the proposed position satisfies the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

No evidence establishes that the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that marketing managers do not require a specific baccalaureate degree.

Because the petitioner never previously employed a marketing analyst, it cannot establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which is that the petitioner normally requires a bachelor's degree or its equivalent in a specific specialty for the proffered position.

The fourth criterion requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The beneficiary's proposed duties do not rise above of a marketing manager as that occupation is described in the *Handbook*. As already discussed, the *Handbook* reports that a marketing manager does not require a bachelor's degree in a specific specialty. As such, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.