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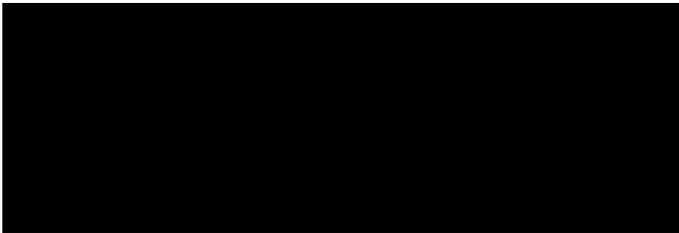
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FILE: WAC 03 135 51688 Office: CALIFORNIA SERVICE CENTER Date: **AUG 16 2005**

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, 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 a manufacturer and designer of jewelry that seeks to employ the beneficiary as a part-time advertising/promotions specialist. 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.

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 part-time advertising/promotions specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail formulating plans to extend business with established accounts; analyzing promotion results to determine cost effectiveness of campaigns; planning and executing advertising policies; planning and designing advertising promotional materials; consulting trade publications to study new promotional strategies/methods; and overseeing production of advertising/promotional materials. The petitioner requires a bachelor's degree in the liberal arts with a focus in marketing, advertising, or communications.

The director determined that the proffered position parallels managerial positions in marketing, promotions, and public relations as those occupations are described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). According to the director, the *Handbook* shows that although some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing, a wide range of educational backgrounds are suitable for these occupations. The *Handbook* also shows, the director stated, that most positions are filled by promoting experienced staff such as former sales representatives and purchasing agents. Consequently, the director found that a bachelor's degree in a specific specialty is not required for marketing, promotions, and public relations specialist positions. The job postings are not persuasive, the director stated, in establishing that the proposed position is a specialty occupation. The director stated that the evidence did not show that the petitioner's business extended beyond the local community, indicating that the market for its services or products is limited to the immediate vicinity in which it operates or is part of a metropolitan area. According to the director, the petitioner does not have the organizational complexity such as a marketing division, department, team, or staff to validate the need for the proposed position. The director stated that no evidence established that the petitioner previously produced an international, national, regional, or local advertising or sales campaign. Without marketing, advertising, and sales staff, the director stated that the duties associated with those occupations, which are not specialty occupation positions, would be performed by the beneficiary. The director referenced *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000), and stated that when determining whether a position qualifies as 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. According to the director, the evidence of record is not persuasive to show that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel asserts that the proposed position qualifies as a specialty occupation. Counsel claims that the *Handbook* reports that advertising/promotions specialists require at least a bachelor's degree and the *Handbook* indicates that marketing, promotions, and public relations managers qualify as specialty occupations. Counsel states that the director's statement that the proposed position is similar to marketing,

promotions, and public relations managers is conclusory. Counsel states that the proposed position is similar to an entry-level position in advertising and public relations, which requires a bachelor's degree, and counsel narrates the *Handbook's* information about the educational requirements of those positions. Counsel describes the *Handbook's* information about the wide range of educational backgrounds acceptable for advertising, marketing, promotions, public relations, and sales managerial jobs, and states that the *Handbook* indicates that no less than a bachelor's degree is acceptable for entry into these occupational fields. Counsel points to the job postings to establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Counsel discusses the court's decision in *Young China Daily v. Chappell*, 742 F.Supp. 552, (N.D.Cal. 1989) and contends that the Board of Immigration Appeals' decision in *Matter of General Atomic Company*, 17 I&N Dec. 532 (Comm. 1980) indicates that a petitioner is not required to show that a particular size of business or industry requires a bachelor's degree in order to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). According to counsel the proposed position has a unique mixture of duties: advertising, marketing, promotions, and public relations. Counsel states that a marketing manager directs a marketing staff, but an advertising and promotions specialist is the expert that researches and devises the methods and strategies that management implements, and understands market research, advertising, promotions strategies, and public relations; all of which is learned through the attainment of a baccalaureate degree or its equivalent in the field. Counsel asserts that the petitioner is not required to provide evidence establishing that it has a marketing division or marketing specialists as the proposed position is not a managerial position; it is analogous to a specialist. Counsel describes the educational background of several employees to establish that the petitioner normally requires a degree or its equivalent for the proposed position. Counsel states that two employees with college degrees had previously created the petitioner's advertising and promotional materials. Counsel asserts that the beneficiary will research, plan, and develop advertising and promotions policies and strategies and forecast and monitor the marketplace; these duties, according to counsel, require a specialized skill set and professional baccalaureate level training. Counsel explains why the proposed duties are specialized and complex, requiring a bachelor's degree in advertising, communications, marketing, or a related field.

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 in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; a specific 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 in a specific specialty. 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. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

Counsel asserts that the *Handbook* reports that advertising/promotions specialists require at least a bachelor's degree, and indicates that marketing, promotions, and public relations managers qualify as specialty occupations. The AAO recapitulates here the *Handbook's* text about the qualifications of public relations specialists:

There are no defined standards for entry into a public relations career. A college degree combined with public relations experience, usually gained through an internship, is considered excellent preparation for public relations work; in fact, internships are becoming vital to obtaining employment. The ability to communicate effectively is essential. Many entry-level public relations specialists have a college major in public relations, journalism, advertising, or communication. Some firms seek college graduates who have worked in electronic or print journalism. Other employers seek applicants with demonstrated communication skills and training or experience in a field related to the firm's business—information technology, health, science, engineering, sales, or finance, for example.

Although the *Handbook* reports “[m]any entry-level public relations specialists have a college major in public relations, journalism, advertising, or communication,” it also reveals “[t]here are no defined standards for entry into a public relations career.” Read in totality, the *Handbook* indicates that many entry-level public relations specialists may possess a baccalaureate degree in certain fields; but employers do not *require* a baccalaureate degree in a specific specialty for a career in public relations. Thus, a baccalaureate or higher degree, or its equivalent, in a specific specialty is not the normal minimum requirement for entry into a public relations specialist position.

Counsel alleges that the *Handbook* indicates that no less than a bachelor's degree is acceptable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs. The below excerpts from the *Handbook* reveal that employers prefer, but do not require, a baccalaureate degree in a specific specialty for advertising, marketing, promotions, public relations, and sales management positions. The *Handbook* states:

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. . . .

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. . . .

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. . . .

. . .

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. . . .

As discussed earlier in this decision, a "specialty occupation" is defined in the Act as an occupation that *requires* theoretical and practical application of a body of highly specialized knowledge, and the 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. Because the *Handbook's* information discloses that employers prefer, but do not require, a baccalaureate degree in a specific specialty for advertising, marketing, promotions, and public relations managerial positions, the proposed position, which is a compilation of these positions, fails to qualify as a specialty occupation. Consequently, the AAO disagrees with counsel's assertion that the *Handbook* reports that marketing, promotions, and public relations managers qualify as specialty occupations.

The AAO cannot locate in the *Handbook* counsel's reference to the subheading of "Training and Advancement" for "Advertising and Public Relations Services." Nevertheless, public relations and advertising positions do not qualify as specialty occupations because an employer's *preference* for a baccalaureate degree in a specific specialty for these positions is not synonymous with an employer's *requirement* for a baccalaureate degree in a special specialty.

The AAO's conclusion, from the various pieces of evidence to which it has referred, is that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree, or its equivalent, in a specific specialty is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. Counsel asserts that *Matter of General Atomic Company* indicates that a petitioner is not required to show that a particular size of business or industry requires a bachelor's degree in order to satisfy this criterion. Yet, the plain language of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) undermines counsel's assertion. It states, quite clearly and without any ambiguity, that a specific degree requirement must be common *to the industry* in parallel positions among *similar* organizations. Consequently, the job postings do not persuasively

establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) because four of the employers in the postings are dissimilar from the petitioner, a small manufacturer and designer of jewelry, and one employer does not disclose its nature. Nash Finch Company is a grocery retail and wholesale company; Premiere Radio Networks, a media company; and Navis LLC and Meridian Project Systems are technology companies. Lagrant Communications is not described in the posting. The job postings, therefore, fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. According to counsel the proposed position has a unique mixture of duties: advertising, marketing, promotions, and public relations. As addressed earlier in this decision, employers do not require a baccalaureate degree in a specific specialty for advertising, marketing, promotions, and public relations managers, which are similar occupations to the proposed position. We have also discussed that although entry-level public relations specialists may possess a baccalaureate degree in certain fields, employers do not require a baccalaureate degree in a specific specialty for a career in public relations. Accordingly, the *Handbook* reveals that the proposed position, which is similar to advertising, marketing, promotions, and public relations managers and public relations specialists, is not so complex or unique that it can be performed only by an individual with a baccalaureate degree in a specific specialty.

Counsel states that a marketing manager directs a marketing staff, but an advertising and promotions specialist is the expert that researches and devises the methods and strategies that management implements, and understands market research, advertising, promotions strategies, and public relations; all of which is learned through the attainment of a bachelor's degree or its equivalent in the field. However, no evidence in the record substantiates counsel's statements. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) the petitioner must normally require a degree or its equivalent for the position. Counsel describes the educational background of several employees to establish that the petitioner normally requires a degree or its equivalent for the proposed position, and states that two employees with college degrees had previously created the petitioner's advertising and promotional materials. On appeal and in the April 26, 2004 letter counsel states that prior to the creation of the proposed position the petitioner's two employees, its president and designer, developed advertising and promotional materials. According to counsel, the petitioner's key employees hold at least a baccalaureate degree.

This is insufficient to establish a past practice of requiring a baccalaureate degree in a specific specialty for the proposed position. The petitioner states that the president and designer hold baccalaureate degrees, but the petitioner does not state whether their degrees are in an appropriate academic field. It has also not been shown that the duties of the president and the designer are the same or similar to those for the proposed position. Accordingly, the petitioner fails to satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific 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. Counsel claims that the proposed duties are specialized and complex, requiring a bachelor's degree in advertising, communications, marketing, or a related field. Counsel states, for example, that the beneficiary must understand marketing trends, keep abreast of advertising media, and have an understanding about the effectiveness of marketing, public relations, and advertising campaigns; research, prepare, and present information to management regarding strategies and programs; develop, present, and assist in implementing new programs; improve marketing methods; and boost sales by increasing the public's exposure to products; and change promotional strategies based on market analysis and public reaction.

These duties, however, correspond to those of a marketing manager as that occupation is described in the *Handbook*. According to the *Handbook*, marketing managers "develop the firm's detailed marketing strategy." With the help of others, "they determine the demand for products and services offered by the firm and its competitors"; "they identify potential markets"; develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits"; "monitor trends that indicate the need for new products and services"; and "work with advertising and promotion managers to promote the firm's products and services and to attract potential users."

As conveyed in this decision, the *Handbook* reveals that the proposed position is parallel to advertising, marketing, promotions, and public relations managers, and to public relations specialists, which are occupations that do not require a baccalaureate degree in a specific specialty. Accordingly, 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 on this ground.

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.