

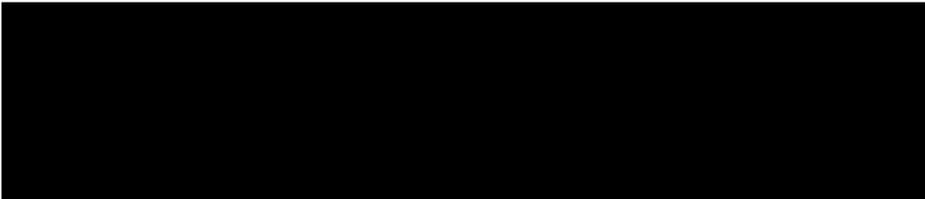
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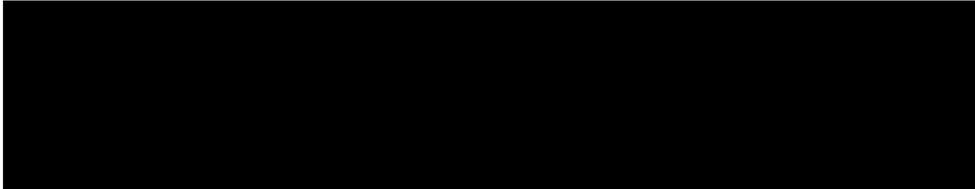
FILE: EAC 04 107 53958 Office: VERMONT SERVICE CENTER Date:

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 acting director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen the proceeding and reconsider its previous decision. The motion is granted. The AAO's previous decision is withdrawn. Upon reopening and reconsideration, the appeal will be dismissed, and the petition will be denied.

The petitioner is the Puerto Rico franchisee of Yum Brands, Inc., which owns KFC, Taco Bell, and Pizza Hut. In order to employ the beneficiary as a marketing manager, the petitioner filed this H-1B petition to continue the classification and extend his stay as a temporary 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). At the time the petition was filed, the beneficiary was in H-1B status pursuant to the approval of a petition filed on his behalf by a previous employer.

The acting director denied the petition because she determined the position was not a specialty occupation. Upon review of the evidence then before it, the AAO determined that the director's decision to deny the petition for failure to establish that the proffered position is a specialty occupation was correct. The AAO's written decision evaluated the evidence of record under each criterion of the specialty-occupation qualifying regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On motion, counsel submits a three-page letter, dated January 24, 2006, in which counsel explains the grounds for the motion, and copies of the following documentation: (1) a sworn declaration from the petitioner's Human Resources Manager that discusses the petitioner's hiring requirements and introduces other documentary evidence presented on motion to support the proffered position as a specialty occupation; (2) pages of separate narratives divided into the following topics: (a) "Why Does [the Petitioner] Need Marketing Managers?"; (b) "Tasks and Duties that Warrant the Expertise of a Bachelor's Degree"; (c) "Why Does a Marketing Manager Position in the Retail Food Business Require a Baccalaureate Degree in a Specific Specialty?"/"[The Beneficiary's] Academic Background is Relevant to the Marketing Manager Position in [the Petitioner]"; (d) "Approximate Percentage of Time Dedicated to Each of the Main Tasks Performed by the [Beneficiary]"; and (e) "Substantiation that this Industry Requires a Bachelor's Degree in a Specific Field of Study as a Standard Minimum Requirement"; (3) check-history printouts that reflect the petitioner's employment of one of the persons identified as one of the petitioner's former marketing managers; (4) resumes and diplomas of some of the persons whom the petitioner has employed as marketing managers or as assistant marketing managers; (5) the beneficiary's resume; (6) two associate-degree diplomas awarded to the beneficiary on December 17, 1983 by the University Community and Technical College of the University of Toledo: Associate in Applied Business diplomas in (a) Marketing and Sales Technology, and (b) Business Management Technology – Retail Management Major; (7) an evaluation of the degree-equivalency of the beneficiary's education and experience by a person who describes himself as an Educational Consultant; (8) the evaluator's resume, which indicates no expertise in marketing management, the academic discipline on which he opines, and does not state that the evaluator is an official of an accredited U.S. college or university who is authorized by such institution to award college-level for training or experience in the specialty upon which he opines; (9) an "Organizational Structure" chart for 2004-2005; (10) an "Organizational Structure" chart for 2006-2007; (11) other employers' advertisements; (12) a five-page exhibit entitled "Job Postings for Marketing Managers in the Food and Restaurant Industry . . .", which includes summarizations of some of the

advertisements submitted into the record; (13) comments on submissions into the record from [www.learnmoreindian.org](http://www.learnmoreindian.org) and [www.carreroverview.com](http://www.carreroverview.com); (14) from the aforementioned Internet sites, printouts that discuss careers in (a) marketing management, (b) product management and (c) brand management; and (15) a letter from the Senior Human Resources Manager, Caribbean Region, of a fast-food restaurant chain, attesting that, for its marketing managers, her company requires a minimum of "a Bachelor's degree in Business Administration preferably in the field of marketing.

Pursuant to its granting of the motion, the AAO reopens the proceeding to accept and consider all the matters submitted on motion, reconsiders its earlier decision in light of those matters presented upon motion and whatever impact they have on determining the correct outcome of the petitioner's appeal. In this reopened proceeding, the AAO bases its decision upon the entire record as presently constituted. This includes the AAO's earlier decision that is the subject of the motion, the brief and all other documents submitted on motion, and the record of proceeding that was before the AAO when it issued its earlier decision on this case. On the bases of the entire record as presently constituted, the AAO finds that petitioner has not satisfied any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the appeal will be dismissed, and the petition will be denied.

In order to prevail on appeal, the petitioner must establish that the evidence of record establishes the proffered position as a specialty occupation in accordance with the following standards.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On motion, counsel asserts that, contrary to the director’s decision and the AAO’s decision that affirmed it, the petitioner has satisfied the third and the fourth criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). As will be discussed below, the AAO finds that the evidence of record does not satisfy either criterion.

The AAO takes into consideration all of the information that the petitioner has presented about itself, including the facts that it is the franchisee of Yum Brands in Puerto Rico, that the petitioner owns 85 restaurant units of KFC, 31 of Taco Bell, and 51 of Pizza Hut – the brand for whom the beneficiary would serve as marketing manager. According to counsel, the Pizza Hut brand “alone had sales in excess of \$45 million in 2004 and employed over 1,200 persons.”

The deliberations in the present proceeding are not affected by the fact, noted by counsel, that CIS has approved a subsequent petition filed by this petitioner on behalf of this beneficiary for a position with the same job title as assigned to the position that is the subject of this motion. 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 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 prior case was similar to

the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the subsequent petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the subsequent would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of other approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

The AAO adopts and incorporates by reference the findings of its previous decision with regard to each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), for the AAO finds that those findings were sound and supported by the record at the time they were made. Upon review and consideration of all of the evidence of record, including all the submissions by counsel and the petitioner from the filing of the Form I-129 through this motion, the AAO has determined that the director's decision to deny the petition was correct. The record does not present an evidentiary basis for classifying the proffered position as a specialty occupation in accordance with any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The comments of this decision on the petitioner's motion will concentrate upon the two criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) that counsel has made the subject of its motion. The AAO notes, however, that, although not requested to do so by counsel, it has also considered the matters on motion under the other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) but found them not to have elevated the evidence of record to a point where it substantiates the proffered position as a specialty occupation under the first two criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Contrary to the view of counsel and the petitioner on motion, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), as the evidence of record does not establish that the petitioner normally requires at least a bachelor's degree in a specific specialty. The number of employees for which the petitioner presents educational information and the time periods to which they relate are too restricted to establish a normal educational requirement under this regulation. Not only does the petitioner present only a narrow selection of hires, but it also does not establish its recruiting practices, which would be highly indicative of the educational credentials that the petitioner has found acceptable. It is also noted that the petitioner indicates that one of the hires held an engineering degree. The record does not establish how such a degree signifies the petitioner's demanding a degree in a specific specialty closely and directly related to marketing management, as required by the Act and its implementing regulations in the context of this petition. Further, neither the job advertisements submitted into the record, the Internet statements about marketing careers, nor any other evidence of record establish that requiring at least a bachelor's degree in marketing or any other specialty closely related to marketing management duties is necessitated by the work that the beneficiary would perform. Also, the AAO notes that the beneficiary himself does not hold a bachelor's degree in marketing or any specialty. The AAO accords no weight to the evaluator's conclusion that the beneficiary's community college work combined with his experience is equivalent to such a degree. The record lacks copies of the beneficiary's academic transcripts. The evaluator's letter indicates that he reviewed a diploma only. The record does not indicate that the evaluator merits any deference on the issue of evaluating the educational equivalence of experience under the relevant CIS regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C)

and (D). Further, the neither the evaluator's resume nor any other evidence of record indicates that he has education and experience in marketing, marketing management, nor any related field that would make him competent to assess the educational merit of marketing or marketing management experience.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Evidence is accorded weight not by its volume, but by its instructive value. Upon review of all the evidence of record, the AAO finds none that distinguishes the proffered position from the wide range of marketing manager positions for which, as referenced in the AAO's earlier decision, the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates no usual association with a degree in a specific specialty. Further, neither the additional comments about the proffered position and its duties nor any other evidence of record relates the proposed duties with sufficient specificity to demonstrate that they require substantive work that involves specialization and complexity above that inherent in the normal range of duties of the marketing manager occupation, for which the *Handbook* indicates no usual association with a degree in any specific specialty. The petitioner's reliance on other employers' advertisements is misplaced. The evidence of record fails to establish substantial similarity between actual work that would be performed in the proffered position and those advertised. Some of the advertisements do not require at least a bachelor's degree in a specific specialty. The advertisements are too few to establish an industry-wide standard, and the record does not establish them as indicative of exclusive recruiting and hiring standards of the advertising firms.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed. The appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, it is noted that the petitioner has not established that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The educational equivalency evaluation upon which the petitioner relies depends partly upon an assessment of the beneficiary's work experience. However, there is no evidence that the evaluator is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. § 214.2(h)(4)(iii)(C)(I). An educational evaluation may evaluate credentials only. For this reason also, the petition must be denied.

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. Accordingly, the appeal will be dismissed.

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