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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



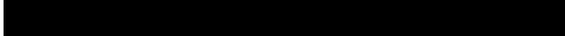
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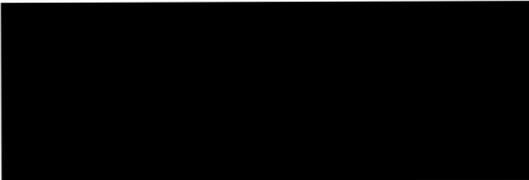


FILE: WAC 08 139 50633 Office: CALIFORNIA SERVICE CENTER Date: **FEB 03 2010**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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.

On the Form I-129, Petition for Nonimmigrant Worker, the petitioner states: that it operates a Mexican restaurant and entertainment complex; that it was established in 2006; that it employs 10 persons, and that its gross annual income is \$746,000. It seeks to employ the beneficiary as a director of marketing. Accordingly, 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).

On September 11, 2008, the director denied the petition, determining that the record did not establish that the petitioner had the organizational complexity to credibly offer the beneficiary a director of marketing position and that the petitioner had not established that the proffered position is a specialty occupation. On appeal, counsel for the petitioner submits a brief and re-submits previously provided documentation.

The record includes: (1) the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel for the petitioner's responses to the director's RFE; (4) the director's denial decision; and (5) the Form I-290B and counsel's statement in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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.

Consistent 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), United States Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS 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.

As referenced above, in the director's September 11, 2008 denial decision, the director determined that the petitioner did not have the organizational complexity to credibly offer the position of marketing director to the beneficiary. The director noted that the petitioner did not have a marketing division or any marketing specialists to gather market data for analysis by a market research analyst or a director of marketing. The director found that the record did not demonstrate that the proffered position should be classified as a *director of marketing*. The director also determined that the petitioner had not established that the duties of the proffered position were specialized or complex or that an industry standard existed establishing the proffered position as a specialty occupation.

On appeal, counsel for the petitioner repeats the petitioner's description of duties and asserts: that the Department of Labor's *Online O*NET (O*NET)* includes a four-year degree as a criterion for a marketing director; that the Department of Labor's *Occupational Outlook Handbook (Handbook)* confirms that a bachelor's degree is generally required for a marketing director position; and that the Florida State University's Department of Career Services advises students that a director of marketing position is a career option for individuals who have attained a bachelor's degree. Counsel also contends that the director has mischaracterized the size of the petitioner's business and that a director of marketing is necessary to meet the petitioner's goals and objectives. Counsel re-submits a letter signed by two individuals, a business growth consultant and advisor, and a managing *sous* chef of a Cleveland, Ohio restaurant in which the two individuals opine: "it will be necessary to add a full-time sales and marketing professional to the [petitioner's] team in order to achieve rapid, stable, and sustainable growth in the Oxford, MI marketplace" and that expecting the petitioner to grow and maintain its current vitality without making the investment in a sales and marketing resource is unrealistic. Counsel concludes that the position being offered is a specialty occupation that requires at least a bachelor's degree and may require further experience.

Before discussing the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this matter, the AAO will address a preliminary issue, namely, the director's statement that a director of marketing occupation requires the employee in that occupation to have a baccalaureate degree. The AAO disagrees with, and thus withdraws, the director's statement. It is unclear whether the director believes that a marketing director is similar to a market research analyst position or not; however, the *Handbook* does not report that either occupation requires that the degrees held by such workers are in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. Thus, neither a marketing director nor a market research analyst position qualifies as a specialty occupation based on information found in the *Handbook*.

The AAO also notes that while it is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position, it is the duties of the position as those duties relate to

the nature of the petitioner's business that are most relevant. *See Young China Daily, et al v. Lois C. Chappell, et al.* at 742 F. Supp. 552 (N.D. Cal 1989); *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). As will be discussed below, the director in this matter correctly determined that the petitioner had not established that the duties of the proffered position comprise the duties of a specialty occupation. The AAO will now discuss and evaluate the evidence of record.

On the Form I-129, the petitioner stated that the proffered position is that of a "director of marketing." In a March 26, 2008 letter appended to the petition, the petitioner indicated that the beneficiary in the position of marketing director:

[W]ill develop and implement a complete and integrated marketing strategy to increase sales, market share and profitability. Working with ownership and management, [the beneficiary] will evaluate and amend [the petitioner's] current marketing program against our company's established performance objectives and goals. Additionally, [the beneficiary] will consult and direct the production of advertising and promotional materials; Develop and recommend programs, incentives, events which will respond to current and projected competition in order to ensure our continued success; and Devise and implement a plan to bank on the business's proximity to the Palace Arena in Auburn Hills, Michigan.

In response to the director's RFE, the petitioner indicated the beneficiary would spend 39 percent of her time developing and implementing marketing strategy including:

- Develop pricing strategies balancing [the petitioner's] objectives and profitability with customer satisfaction.
- Develop and coordinate marketing activities, including advertising and other promotional undertakings.
- Evaluate the financial aspects of [the petitioner's] marketing development, including return-on-investment and profit-loss projections.
- Design and implement a strategic plan to capitalize on the business's proximity to the Palace Arena in Auburn Hills, Michigan.
- Conduct customer analysis, company analysis, and competitor analysis to allow [the petitioner] to continually expand its customer base and compete successfully in a competitive food services market.
- Organize and implement customer relations, including: customer satisfaction surveys, customer development activities, special events, etc.

The petitioner indicated the beneficiary would spend 28 percent of her time amending the current marketing program including:

- Review and analyze [the petitioner's] current marketing program to identify areas that require enhancement or modification and work closely with ownership and management to reformulate such program based on knowledge of its objectives and goals.

- Advise ownership and management of factors affecting the sales of [the petitioner's] services in order to determine the best course to take in amending [the petitioner's] current marketing program.
- Review [the petitioner's] current marketing activities, including electronic and digital media programs (e.g. website) and paper brochures, and develop new marketing procedures, including website development, new brochure design, new menu design and production, etc.

The petitioner added that the beneficiary would spend 20 percent of her time developing and organizing events including:

- Coordinate and participate in promotional activities and events, such as entertainment shows, in order to attract new patrons and promote [the petitioner's] services.

The petitioner further noted that the beneficiary would spend 13 percent of her time advising on décor and aesthetics including:

- Advise ownership and management on display of items and accessories as well as internal décor based on marketing studies and customer analysis of what environments and atmospheres are most satisfying to customers.

Although the petitioner labels the proffered position a director of marketing position, the petitioner provided excerpts from the *Handbook* and the *O*NET* regarding the occupation of market managers.

The AAO has reviewed the evidence in the record and does not find the evidence of record persuasive in establishing the proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations as one method to determine whether a baccalaureate or higher degree or its equivalent in a specific discipline is normally the minimum requirement for entry into a particular position. Under the heading "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" the *Handbook* discusses the occupations of advertising, marketing, and promotions managers as follows:

Advertising managers. Advertising managers direct a firm's or group's advertising and promotional campaign. They can be found in advertising agencies that put together advertising campaigns for clients, in media firms that sell advertising space or time, and in companies that advertise heavily. They work with sales staff and others to generate ideas for the campaign, oversee a creative staff that develops the advertising, and work with the finance department to prepare a budget and cost estimates for the campaign. Often, these managers serve as liaisons between the firm requiring the advertising and an advertising or promotion agency that actually develops and places the ads. In larger firms with an extensive advertising department,

different advertising managers may oversee in-house accounts and creative and media services departments. The *account executive* manages account services departments in companies and assesses the need for advertising. In advertising agencies, account executives maintain the accounts of clients whereas the creative services department develops the subject matter and presentation of advertising. The *creative director* oversees the copy chief, art director, and associated staff. The *media director* oversees planning groups that select the communication medium—for example, radio, television, newspapers, magazines, the Internet, or outdoor signs—that will disseminate the advertising.

Marketing managers. Marketing managers work with advertising and promotion managers to promote the firm's or organization's products and services. With the help of lower level managers, including *product development managers* and *market research managers*, marketing managers estimate the demand for products and services offered by the firm and its competitors and identify potential markets for the firm's products. Marketing managers also develop pricing strategies to help firms maximize profits and market share while ensuring that the firms' 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 they oversee product development.

Promotions managers. Promotions managers direct promotions programs that combine advertising with purchasing incentives to increase sales. Often, the programs are executed through the use of direct mail, inserts in newspapers, Internet advertisements, in-store displays, product endorsements, or other special events. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, and contests.

Upon review of the petitioner's description of the proffered position, the AAO finds that the duties of the proffered position contain elements of and correspond generally with the *Handbook's* statements regarding the occupations of a marketing and promotions manager. Regarding the educational requirements for the positions under this heading, the *Handbook* reports:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager jobs, but many employers prefer college graduates with experience in related occupations.

The *Handbook* reports more specifically:

Education and training. For marketing, sales, and promotions management positions, employers often prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. In addition, the completion of an internship while the candidate is in school is highly recommended. In highly technical industries, such as computer and

electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

Thus, the *Handbook* recognizes that although a general degree in business administration may be preferred it is not required. The *Handbook* also recognizes that a diverse group of degrees may satisfy employer requirements for entry into a marketing/promotions managerial position, confirming that there are no defined standards for entry into such a position. The director in this matter correctly interpreted the *Handbook's* report regarding educational requirements for a marketing/promotions managerial position. The *Handbook's* indication that a variety of degrees may be advantageous for the position but also noting the lack of defined standards for entry into the position precludes a conclusion that the position would categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. It is incumbent on the petitioner to establish that its particular position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. This, the petitioner has failed to do.

The AAO has also reviewed the excerpt from the *O*NET* regarding the position of a marketing manager. As noted above, the petitioner's description of job duties seems to generally correspond to the duties of a marketing manager position. However, the AAO has long found that neither the *DOT* nor its successor the *O*NET* are persuasive sources of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. Both the *DOT* and the *O*NET* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP or Job Zone rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. The AAO observes that the petitioner's excerpt from the *O*NET* reports that most of these occupations (including marketing director, marketing manager, vice president of marketing, business development manager, marketing coordinator, account supervisor business development director, commercial lines manager, commercial marketing specialist, market development manager) require a four-year bachelor's degree, but some do not. Such a wide ranging list of possible job titles and necessarily corresponding diverse job duties, and possible educational requirements does not assist in identifying the particular proffered position as a position that requires a bachelor's degree or its equivalent in a specific specialty.

The AAO has reviewed the April 7, 2008 opinion of [REDACTED] and [REDACTED] and [REDACTED] and finds that although both individuals indicate the petitioner's need for a sales and marketing professional, neither individual indicates that the individual must have a bachelor's or higher degree in a specific discipline. The AAO further notes that neither individual supports his opinion with formal surveys, research, statistics, or any other objective quantifying information.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty-occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO now turns to consider whether the petitioner may qualify the proffered position under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

A review of the evidence of record finds it insufficient to establish the proposed duties comprise a position that is identifiable with an industry-wide educational standard, or is distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. The AAO again acknowledges the letter submitted by [REDACTED] and [REDACTED] but finds that the opinion offered is insufficient to establish that there is an industry-wide educational standard for a sales/marketing/promotions position similar to the petitioner's proffered position. Again, neither [REDACTED] nor [REDACTED] references surveys or established publications to substantiate that the employment of individuals with the general duties described for the proffered position require a bachelor's or higher degree in a specific discipline. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner has not provided evidence for the record that demonstrates that a degree requirement in a specific discipline is common to the industry in parallel positions among similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner in this matter has also failed to establish the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which requires that the proffered position be of such complexity or uniqueness that it can be distinguished from other marketing/sales/promotions positions within the same industry. The record does not contain evidence detailing what duties of the petitioner's marketing director require the attainment of a baccalaureate or higher degree in a specific discipline. The record lacks evidence or analysis establishing that particular duties of the proffered position differ from the routine duties of a skilled marketing/sales/promotions position. As the described duties are generic and routine, the AAO does not find that the evidence of record establishes that the specific duties of the proposed position are more specialized and unique than those of a typical marketing/sales/promotions position or are so complex or unique that they can be performed only by an individual with a degree in a specific discipline. The petitioner has not provided evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record also fails to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the proffered position. To determine whether the petitioner has fulfilled the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. As the petitioner has not previously employed a marketing director, the petitioner is precluded from establishing this criterion. The AAO also observes that a petitioner's self-imposed employment requirements may not always establish that a position is a specialty occupation, as self-imposed employment requirements without additional information, would allow any alien with a bachelor's degree to be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. The record in this matter is insufficient to establish that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline and, therefore, establish the proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The duties of the proffered position show that the tasks relate primarily to the routine duties of a marketing manager. Although the petitioner asserts that the duties of the position are the duties of a specialty occupation, the petitioner has not explained what particular duties of the proffered position comprise tasks that require the application of specialized or complex knowledge associated with the attainment of a baccalaureate or higher degree in a specific discipline. The petitioner has not adequately explained how the duties of the proffered position differ from those of a generalist position in this same field. The petitioner has not substantiated that the nature of its business requires an individual who must perform duties that are specialized and complex such that the position should be designated a specialty occupation. Although the position may require skill, the petitioner has not established that such skill may be attained only through the specialized coursework attendant to a four-year university level education in a specific discipline. The record does not include sufficient evidence to demonstrate that the petitioner established the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The petition will be denied and the appeal dismissed for the above stated reason. 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.