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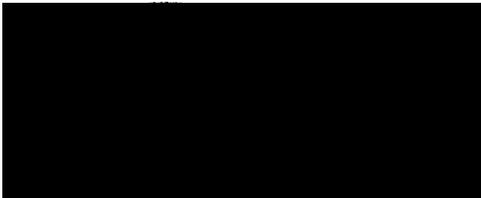
FILE: WAC 04 084 51689 Office: CALIFORNIA SERVICE CENTER

Date: AUG 24 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 a travel service that seeks to employ the beneficiary as a market research 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 on the ground that the proposed position does not qualify as 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 market research analyst. 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. This evidence indicates that the beneficiary would perform duties that entail collecting and analyzing data about domestic and global travel services from sources such as the Internet, newspapers, magazines, and financial reports that were prepared by competitors; conducting market research with a focus on market tendencies and changes, prices, and competitors' marketing patterns; studying and collecting business policies, laws, and codes and becoming familiar with business procedures and practices in target countries and areas; preparing research reports; and giving advisory opinions about the company's business policies, strategies, and adjustment. Counsel's March 26, 2004 letter elaborated on the proposed duties. The petitioner states that the proposed position requires a bachelor's degree in marketing.

The director stated that some of the proposed duties reflect those of a market research analyst as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). But the director stated that sole reliance on the *Handbook* and other governmental publications to demonstrate that a position is a specialty occupation is misplaced. When determining whether a position qualifies as a specialty occupation, the director stated that each position must be evaluated based on the nature and complexity of the job duties, and that performing incidental specialty occupation duties is insufficient to establish that a position is a specialty occupation. The director also stated that the beneficiary's degree in a related area does not guarantee that a position is a specialty occupation. The director was not persuaded to classify the proposed position as a market research analyst given that the petitioner is not in the industry that the *Handbook* describes as employing market research analysts. The director found the petitioner did not have the organizational complexity to require the services of a market research analyst. No evidence establishes, the director stated, that the petitioner produced an advertising campaign through its own in-house account, creative, and media services departments. Thus, the director concluded that the beneficiary would perform mainly duties of advertising, marketing, promotions, public relations, and sales managers as those occupations are described in the *Handbook*, and that the *Handbook* reports that a bachelor's degree is not required for these occupations.

On appeal, counsel asserts that the director narrowly interprets the *Handbook's* information about the industries employing a market research analyst. According to counsel, although the petitioner, a travel service, is not in an industry employing the largest number of market research analysts, this does not mean that it does not require the services of a market research analyst. Counsel further contends that under the Act and the regulations a petitioner is not required to engage in the kind of enterprise in which a market research analyst would typically be hired, or show sufficient organizational complexity in order to validate a market research analyst position, or demonstrate that it has a marketing department or has carried out an advertising campaign. Counsel emphasizes that the petitioner's competitors employ full-time market research analysts, and that the petitioner has no evidence to substantiate this due to the confidentiality of competitors. Counsel claims that the director states that the proposed duties resemble those of a market research analyst, and then

contradicts this by stating that the duties resemble those of advertising, marketing, promotions, public relations, and sales managers. Counsel states that the director did not properly consider the job description submitted in the response to the request for evidence, and that the petitioner has 40 employees and annual revenue of over \$20 million.

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* regarding the comprehensive description of the nature of particular occupations and the education, training, and experience normally required to enter into and advance within the occupation.

The AAO observes that the job description submitted in response to the request for evidence states that the beneficiary will report to the company's president and the manager of the marketing department. However, the organizational chart and the accompanying supplement do not show a position entitled "manager of marketing department." It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence in the record explains or reconciles this inconsistency.

Counsel asserts that the proposed position parallels a market research analyst. A review of the *Handbook* indicates that a principal responsibility of a market research analyst, which is a specialty occupation, is to conduct primary research by devising methods and procedures for obtaining data. The *Handbook* explains that:

Market, or marketing research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on

competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

The evidence of record does not establish that the beneficiary will principally conduct primary research. The petitioner's job description and counsel's March 26, 2004 letter describes the beneficiary as mainly obtaining data from secondary - not primary - sources. Also, the beneficiary is not depicted as devising surveys that will be conducted through personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls.

The AAO finds that the proposed position is more comparable to a marketing manager, and we recapitulate here the *Handbook* text about this occupation:

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.

A marketing manager develops a firm's marketing strategy, determining the demand for products and services offered by the firm and its competitors, identifying potential markets, monitoring trends that indicate the need for new products and services, and promoting the firm's products and services and attracting potential customers. This is similar to the proposed duties which include collecting and analyzing data about domestic and global travel services from sources such as the Internet, newspapers, magazines, and financial reports that have been prepared by competitors; conducting market research with a focus on market tendencies and changes, prices, and competitors' marketing patterns; drawing a picture of business development possibilities in overseas countries; and conducting new project feasibility studies to open new business lines.

The *Handbook* reports the following regarding the educational requirement for a marketing manager:

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. . . .

Thus, the above excerpt from the *Handbook* reveals that employers prefer, but do not require, a bachelor's degree in a specific specialty for a marketing manager. Because the *Handbook* relays that employers do not require a bachelor's degree in a specific specialty for a marketing manager, which is similar to the proposed position, the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree in a specific specialty, or its equivalent, is the normal minimum requirement for entry into the particular position.

The petitioner has not established the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence demonstrates that a specific degree requirement is common to the industry in parallel positions among similar organizations.

To satisfy the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must show 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. As discussed earlier, the AAO finds that the proposed position resembles a marketing manager, which is an occupation that the *Handbook* reveals does not require a bachelor's degree in a specific specialty. No evidence shows that the proposed duties are so complex or unique as to require the services of an individual with a degree in a specific specialty. Thus, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Because the proposed position is newly created, no evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

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. In this decision the AAO has already conveyed why the proposed position is similar to a marketing manager, which is an occupation that does not require a bachelor's degree in a specific specialty. No evidence demonstrates that the proposed position has such specialization and complexity as to require knowledge that is usually associated with the attainment of a baccalaureate degree in marketing. 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 the ground that the proffered position is not a specialty occupation.

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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.