

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Massachusetts Avenue, NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D 1



FILE: WAC 03 260 50309 Office: CALIFORNIA SERVICE CENTER Date:

JAN 0 1 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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 company engaged in the wholesale of toys and general merchandise that seeks to employ the beneficiary as a market research analyst. 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).

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 market research analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 10, 2003 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: assisting management in providing market research needed to support the on-going operations in the areas of product positioning and development, pricing, advertising, end user/patients' wants and needs and other competitive activities; planning, executing and summarizing primary "service demands" research, as well as locating, reviewing and summarizing secondary research; planning and conducting research that answers marketing questions regarding product quality and reasonable prices; determining the meaning of the data gathered and writing a report for the company recommending a course of action; gathering vital data regarding the petitioner's competitors; analyzing the competition's service methods and conducting evaluations of their techniques in marketing, promotion and distribution, to be used to determine new approaches by the petitioner; designing surveys to assess customer preferences and formulating recommendations for maintaining service quality; and conducting opinion research to determine the public response to the petitioner's products and services. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in commerce, business administration, business management, economics or other related courses involving the study of marketing.

The director found that the proffered position was not a specialty occupation and that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the proffered position is a specialty occupation, and that the director based his decision on his own assessment of the petitioner's business needs, rather than on the regulatory requirements of establishing a position as a specialty occupation.

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 turns first to 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.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The director determined that the position of market research analyst, as it would be implemented in the petitioner's

organization, is not a specialty occupation. The director stated that the duties of the proffered position essentially parallel those in the Department of Labor's *Dictionary of Occupational Titles (DOT)*, without providing significant additional information. While counsel is correct in stating that it may be not be possible to avoid similarities with the position descriptions in the *DOT* or other resources, the petitioner still must establish that a bona fide position exists within the organization. The petitioner has not provided enough detail to establish that the beneficiary would actually be working as a market research analyst, and it has not shown how its business would specifically use a market research analyst or what the beneficiary would do in that position. In addition, the AAO notes that the first duty of the position description in both the letter of support and the response to the director's request for evidence references "end user/patients wants/needs," which indicates that the petitioner may have simply copied a position description from another source involved in healthcare, without concern for how the petitioner would, in fact, utilize such an employee.

The director found that the petitioner had not established that it needs a market research analyst:

[T]he Service is not persuaded that a business engaged in wholesale toys and general merchandize [sic] with four (4) employees according to the organizational chart, requires the full-time services of a market research analyst for 3 years, when the petitioner can hire a consultant to do the same job without committing a [sic] full-time employment, and more cost effective for the company to hire an individual on a per-project basis. The Service also points out that the petitioner's [sic] been in the business since 1984. It seems odd that after nineteen (19) years in the business the petitioner has not submitted any evidence that they had employed a market research analyst in the past. In addition, the petitioner's organizational chart does not show positions for a secretary, accountant, bookkeeper, accounting clerk, and receptionist.

None of these concerns are elements of the H-1B adjudication, and it is not for CIS to make a determination as to the business necessity of a given position in adjudicating this classification of visa petition. The petitioner does, of course, need to establish that the position actually exists. The lack of detail in the position description makes it difficult to determine if a bona fide position exists.

There is no reason to believe that the petitioner does not have a need to assess its competitiveness in its field, and to create new opportunities for marketing its products. As noted above, however, the petitioner has not established how the beneficiary would be performing these duties within the context of its organization. The issue is not whether a market research analyst is a specialty occupation, because it normally is, but whether the petitioner has established that the beneficiary would actually be performing the duties of a market research analyst. The petitioner has not provided enough information to establish that the beneficiary would be acting in this position. The petitioner has failed to establish that the beneficiary will be coming to the United States temporarily to perform services in a specialty occupation as required by the statute and regulations. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), 8 C.F.R. § 214.2(h)(1)(ii)(B)(I).

Regarding parallel positions in the petitioner's industry, the petitioner submitted four Internet listings for market research analysts. As noted above, a market research analyst is generally considered to be a specialty occupation, but the petitioner has not established that the proffered position is that of a market research analyst. In addition, there is no evidence to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. They do not appear to be within the petitioner's industry, or from companies of similar size and financial standing. Thus, the advertisements have little relevance. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner has never hired someone for this position in the past and, as such, is not in a position to meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

Counsel states that this is the element most relevant to the proffered position. To the extent that they are depicted in the record, however, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. As noted above, the position description lacks detail about how the beneficiary would perform this position; therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.