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U.S. Department of Justice  
Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



Public Copy

File: WAC-99-226-52506 Office: California Service Center

Date: APR 04 2001

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)

IN BEHALF OF PETITIONER:



Identification data deleted to prevent clearly unwarranted invasion of personal privacy.

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Acting Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a film production and distribution business with two to five employees and approximately \$175,000 gross annual income. It seeks to employ the beneficiary as a research analyst for a period of three years. The director determined that the petitioner had not established that the beneficiary qualifies to perform services in a specialty occupation. The director further noted that the petitioner had not submitted an approved Labor Condition Application, Form ETA 9035.

On appeal, counsel indicates that he is not submitting a separate brief or evidence and further states that:

The Service erred in applying the Department of Labor's new policy of requiring Master's degrees for Market Research Analysts to the Beneficiary in this case. This is because the job offered, that of Research Analyst, is unrelated to Market Research Analyst and still requires a Bachelor's degree only.

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), provides in part for nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and
3. Evidence that the alien qualifies to perform services in the specialty occupation.

The labor condition application submitted by the petitioner was not certified by an authorized Department of Labor official pursuant to 8 C.F.R. 214.2(h)(4)(i)(B)(1). As the certification block is incomplete, it is concluded that the petition may not be approved.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary's foreign education has been found by a credentials evaluation service to be equivalent to a baccalaureate degree in film and video production conferred by an accredited United States institution. This evaluation is based upon the beneficiary's baccalaureate degree in film, video, and photographic arts with specialist studies in film and video conferred by a university in England. Accordingly, it is concluded that the petitioner has shown that the beneficiary qualifies to perform the duties of the proffered position.

The term "specialty occupation" is 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.

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.

The duties of the proffered position are described in pertinent part as follows:

The position of Research Associate involves responsibilities for primary research into the subject matter of our productions, as well as researching and analyzing the highly complex demographic, psychological, sociological and cultural conditions affecting consumer motivation and behavior within a varied ethnic population. The Research Associate will utilize social research methodology techniques, including techniques of statistical investigation, quantitative and analytical approaches, survey and research design, to study motivational factors, value and attitude formation processes influencing viewers' decisions. She will develop primary data and conduct targeted analysis to

identify markets and consumer response to different marketing approaches. She will design and implement the most appropriate methodology and data-gathering format, and will interpret and analyze research results. Based on her findings, she will determine marketing approaches that would maximize the company's business operations in terms of customer satisfaction and profitability.

The Research Associate will perform his [sic] primary research into our productions' subject matter utilizing traditional library research, multimedia and internet tools, as well as European library sources. She will also bear responsibility for evaluating media proposals and administering associated records. She will develop and conduct targeted analysis--including audience response studies, ratings, surveys, experimental tests of programming, formative evaluation and gathering of primary and secondary data sources--to identify target markets and to predict audience reaction to different productions in terms of appeal, playability and critical reception. The Research Associate will research and analyze local, regional, national and international motion picture market segments, focusing in particular on the ethnic and cultural factors affecting international audiences, the fastest growing segment of our market. She will develop research designs to monitor and analyze demographic and lifestyle data; and he [sic] will undertake special studies on market trends and historical data using principles of social research methodology and statistical analysis, multiple regression, and model building; and he [sic] will analyze and evaluate quantitative and theoretical model approaches to the studying of effects of mass communication and of the social networks systems on consumer behavior.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to combine the duties of a marketing manager with those of a researcher. A review of the Department of Labor's Occupational Outlook Handbook, 2000-2001 edition, at page 26 finds no requirement of a baccalaureate degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing managerial positions.

Some employers prefer degrees in business administration but bachelor's degrees in various liberal arts fields are also acceptable. In addition, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background.

It is further noted that the beneficiary's research activities do not appear so complex as to require a baccalaureate degree in a specialized field of study, as distinguished from a baccalaureate degree in any field or familiarity with the subject matter. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of regulations.

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 decision of the director will not be disturbed.

**ORDER:** The appeal is dismissed.