



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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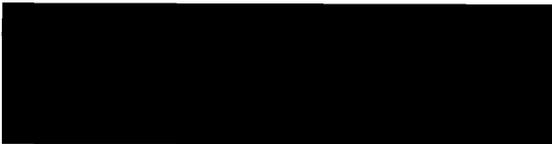
File: WAC-99-179-53352 Office: California Service Center

Date: JAN 18 2001

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)

IN BEHALF OF PETITIONER:



Identifying information 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

Mary C. Mulrean, 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 The decision of the director will be withdrawn and the petition remanded for further consideration.

The petitioner is a food mart/service center business with four employees and \$90,000 gross annual income. It seeks to employ the beneficiary as a research analyst (operations) for a period of three years. The director determined the petitioner had not established that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel argues that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

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 petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

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 does not hold a baccalaureate degree in any field of study. A credentials evaluation service has determined that the beneficiary's foreign employment experience is equivalent to a baccalaureate degree in marketing conferred by a United States institution.

This Service uses an independent evaluation of a person's foreign credentials in terms of education in the United States as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be rejected or given less weight. See Matter of SEA, Inc., 19 I&N Dec. 817 (Comm. 1988).

Here, the evaluation of the beneficiary's foreign credentials is based on experience alone. The evaluator indicates that he based his report on two employment letters describing an aggregate of 18 years of progressive employment. Such letters, in and of themselves, do not sufficiently demonstrate that the beneficiary

has received recognition of expertise in the specialty occupation as a result of such experience. It is noted that the letter dated October 19, 1994, gives no details such as the size of the foreign business or its number of employees. Further it appears that the author may be a relative of the beneficiary as their surnames are the same. The evaluator further indicates that the research materials he used in his evaluation were college catalogs. It is noted that copies of the relevant portions of his research materials have not been submitted. In addition, neither the petitioner nor the evaluator has persuasively demonstrated that the beneficiary's experience was experience in a specialty occupation. Accordingly, the evaluation is accorded little weight.

The beneficiary is not a member of any organization whose usual prerequisite for entry is a baccalaureate degree in a specialized area. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes her to practice a specialty occupation. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary qualifies to perform services in a specialty occupation.

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 beneficiary] will review the company's organizational, marketing and operational structure and will develop appropriate operational and marketing strategies and solutions in order to maximize productivity and efficiency. He will define information needs and priorities; and identify goals and strategies to improve utilization of resources and to generate improved time and cost savings.

[The beneficiary] will apply statistical and economic research methodologies to perform profit analysis in order to determine if our margins are set at appropriate levels in comparison to the rest of the relevant industry. He will determine which components of the business are functioning below par and which margins can be flexed. He will prepare operations reports highlighting current operational practices, labor costs, and activity records, and will monitor and act upon all critical activities. He will perform operations reconciliations in order to determine whether specific activities generate the proposed revenues, expenses, costs and profits. He will compile data and prepare charts illustrating research results; and he will determine and recommend methodological strategies that would make the company's services competitive with others in the market-place.

[The beneficiary] will undertake special studies on market trends using business statistics. Based on his findings, he will formulate recommendations concerning: financing, distribution methods, contract policies proposed investment and expansion values and untapped market opportunities.

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.

Counsel asserts that the Department of Labor has determined that the proffered position is a specialty occupation. However, a reference in the Department of Labor's Dictionary of Occupational Titles (DOT), Fourth Edition, 1977, standing alone, is not enough to establish an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

It is noted that despite the assertion by the petitioner's owner in his letter dated June 5, 1999, that the petitioning entity, a food mart, "is continuing to expand its operations", information on the present petition indicates that it has a total of four employees, one employee fewer than those claimed on the petitioner's original petition. As such, the petitioner has not persuasively established that it has the growth or organizational complexity to warrant the services of a research analyst.

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to be that of a marketing manager. The Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, at page 149 finds that graduate training in such fields as economics, business administration, marketing, statistics, or some closely related discipline is required for many private sector marketing research analyst jobs. The Handbook further states that:

A bachelor's degree with a major in economics or marketing may not be sufficient to obtain some positions as an economist or marketing analyst, but is excellent preparation for many entry-level positions as a research assistant, administrative or management trainee, marketing interviewer, or any of a number of professional sales jobs.

The above description indicates that the minimum requirement for a marketing research analyst position is a bachelor's degree in economics or marketing. The record, however, does not demonstrate

that the beneficiary possesses either a bachelor's degree in economics or marketing or its equivalent, or a master's degree.

The Handbook at page 26 also 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. 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.

This petition is remanded to the director to determine whether to revoke the approval of the original petition based on the issues of whether the position is a specialty occupation and whether the beneficiary qualifies to perform services in a specialty occupation. It is noted that counsel has provided copies of the original petition and support documentation. If the original petition is revoked, this petition would be moot. This case will be remanded for the director to review the original petition for determination as to whether the original petition should be revoked in accordance with 8 C.F.R. 214.2(h)(11).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The director's decision of June 30, 1999, is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing.