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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: EAC-99-115-52198 Office: Vermont Service Center

Date: 2/1/2001

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)

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:



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, 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 travel agency with six employees and a gross annual income of \$4 million. It seeks to employ the beneficiary as a marketing analyst for a period of two years and ten months. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director concluded that the record contains insufficient evidence to demonstrate that the proffered position requires the theoretical and practical application of highly specialized knowledge to perform the proposed duties. On appeal, counsel states in part that the offered position clearly qualifies as a specialty occupation and submits an evaluation of the duties of the position and the academic credentials and work experience of the beneficiary.

Counsel's argument on appeal is not persuasive. The Service does not rely solely on the title of a position in determining whether that position qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- (1) Research travel industry and market conditions to determine potential increases in services for Asian countries, especially India;
- (2) Design, promote, price, and distribute travel and travel related services;

- (3) Generate, define and evaluate marketing options for various airlines;
- (4) Devise methods and procedures for collecting data regarding airfares, cruises, etc.;
- (5) Code, tabulate and evaluate data for the above; and
- (6) Make recommendations to management based on findings and suggest course of actions [sic].

In response to a Service request for additional information regarding the offered position, the petitioner described the duties of the position as follows:

- (1) Research market condition in local, regional, or national area to determine potential sales of product or service;
- (2) Establish research methodology and designs format for data gathering, such as surveys, opinion polls, or questionnaires;
- (3) Examines and analyzes statistical data to forecast future marketing trends;
- (4) Gather data on competitors and analyzes prices, sales and methods of marketing and distribution;
- (5) Collect data on customer preferences and buying habits;
- (6) Prepare reports and graphic illustrations of findings.

The duties described above appear to paraphrase the duties described in the Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, for the position of market research analyst. The position, however, does not appear to be primarily that of a business analyst/market research analyst. Therefore, the Service is not persuaded to classify the position as the specialty occupation of a market research analyst.

The first reason why the Service is not persuaded to classify the offered position as a business analyst/market research analyst position concerns the particular duties of the offered position compared with the duties of a typical market research analyst position. At page 148 of the Handbook, the DOL states that "[m]arket research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales." While the duties described by the petitioner appear to involve some sales analysis, the proffered position appears to be primarily that of a marketing manager or a

market research manager as will be discussed further in this decision.

The second reason why the Service is not persuaded to classify the offered position as a market research analyst position relates to the type of industry in which the beneficiary would be employed. Information in the Handbook, at page 149, provides insight into the types of industries in which market research analysts are normally found. According to the DOL:

Private industry provided about 4 out of 5 jobs for salaried workers, particularly economic and marketing research firms, managements consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

Although the list of private industry employers is not all inclusive, the DOL's description of a market research analyst's job implies that these types of positions are found within large firms or corporations, such as banks or worldwide pharmaceutical companies.

The record indicates that the petitioner, which is engaged in the travel industry, employs six persons and has a gross annual income of \$4 million. The travel industry, the industry in which the petitioner is engaged, is not within the DOL's list of industries that typically require the services of a full-time individual who performs only market research analyst duties.

The third reason why the Service is not persuaded to classify the offered position as a market research analyst position relates to the financial status of the petitioner's business. According to the petitioner's 1997 corporate federal income tax return, the petitioner reported a gross profit of \$156,969 and total deductions of \$129,007, with a remaining income after taxes of \$27,962. The petitioner indicates on the petition that the beneficiary would be paid a salary of \$26,000 per year. In view of the foregoing, it does not appear that the petitioner is in a position to take advantage of market research analysis. Furthermore, there is no indication in the record that the petitioner has applied for and received an equity line of credit for the purpose of expansion, which would indicate a need for a full-time market research analyst position. For these reasons, the Service is not persuaded to label the offered position as a market research analyst position.

Although the Service does not agree with the petitioner that the position it is offering is a market research analyst position, the petitioner could, nevertheless, qualify the offered position as a specialty occupation if the petitioner could establish that:

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.

See. 8 C.F.R. 214.2(h)(4)(iii)(A).

An analysis of the beneficiary's proposed duties reveals that the job being offered is the job of a marketing manager or a market research manager. According to DOL at page 25 of the Handbook:

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 . . . Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firms'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.

The beneficiary's proposed job duties, which include designing, promoting, and pricing travel related services and researching the travel industry to determine potential increases in service for Asian countries, parallel the job responsibilities of a marketing manager or market research manager. Information at page 25 of the Handbook does not indicate that either position requires a bachelor's degree in a specific field of study. Rather, most employers prefer a wide-range of educational backgrounds or promote individuals from within companies. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Additionally, the petitioner has not provided any evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position.

Counsel asserts on appeal that a degree requirement is common to the travel industry in parallel positions among similar organizations and submits an evaluation of the offered position and the academic credentials and work experience of the beneficiary by Dr. Janet DiLorenzo, Assistant Professor of Marketing at Fordham University. Dr. DiLorenzo states that the duties of the proffered position qualify the offered position as a specialty occupation. Dr. DiLorenzo based this conclusion in large part on the position description for a market analyst in the Department of Labor's Dictionary of Occupational Titles. However, a reference in the DOL's DOT, Fourth Edition, 1977, standing alone, is not enough to establish that 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 DOL in the various editions of the 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.

The record contains three letters from other travel agencies stating that a baccalaureate degree is a standard requirement for positions as market analysts. [REDACTED] President of Worldwide Travel Services, states in his letter that the position of Marketing Analyst requires someone with a baccalaureate degree and demonstrated experience in the travel industry and asserts that all of his managerial staff "possess significant university education." [REDACTED] President of Shoppers Travel, Inc., states that he employs two college graduates [with specialization] in either travel or marketing. [REDACTED] President of Ariana Tours & Travel, states that his firm is currently seeking a marketing representative with a baccalaureate degree in marketing and previous experience in the travel industry. Three letters, however, are insufficient evidence of an industry standard. In addition, the writers of the letters have not provided evidence in support of their assertions that they employ or are seeking to employ individuals with a baccalaureate degree in a specialized area such as marketing in parallel positions.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding for the position of a market research manager or marketing manager. Therefore, the director's decision is affirmed.

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.