

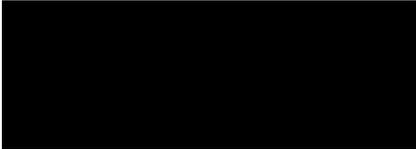


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U.S. Department of Justice
Immigration and Naturalization Service

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



11 APR 2002

File: EAC-99-043-51568 Office: Vermont Service Center

Date:

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)

Public Copy

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, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a wholesale import and merchandising business with 30 employees and a gross annual income of \$12 million. It seeks to employ the beneficiary as a market research analyst for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel had provided additional information in support of the appeal.

The Associate Commissioner dismissed the appeal reasoning that the beneficiary had no master's degree in either economics or marketing. The Associate Commissioner further found that the proposed position appeared to combine the duties of a general manager or executive and a marketing manager and did not require a baccalaureate degree in a specialized area.

On motion, counsel states, in part, that a review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) finds that a bachelor's degree in economics or marketing is sufficient for many entry-level research, administrative, management trainee, and sales jobs. Counsel submits newspaper ads to demonstrate that a baccalaureate degree is required in nearly all such positions. Counsel also states that the proffered duties are so complex that at least a baccalaureate degree or an equivalent is required.

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.

Counsel's argument on motion 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:

. . . we have determined a need to review and further develop and expand our import market in Asia in order to meet the expected future demands of our products.

. . . we are in need of the professional services of a market research analyst to undertake market research and to gather and analyze information and statistics on target areas for our expansion, performing quantitative and qualitative research with focus groups and subgroups, and to develop a coherent market strategy which will assist us in developing our import market in Asia and the Pacific rim and also in expanding our domestic market on the West Coast of the U.S. His duties will also include the conducting of surveys and research into the manufacturing, supply and transportation markets and networks, and data and comparative cost analysis and strategy development.

The duties described, while quite detailed, are not the responsibilities of a market research analyst as set forth in the DOL's Handbook, 2002-2003 edition. 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 market research analyst position concerns the particular duties of the offered position compared with the duties of a typical market research analyst position. In its 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, they appear to be primarily those of a marketing manager or a market research manager for reasons that will be discussed herein.

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, provides insight into the types of industries in which market research analysts are normally found. According to the DOL:

Private industry provided about 9 out of 10 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 wholesale importing and merchandising, employs 30 persons and has a gross annual income of \$12 million. The business of wholesale importing and merchandising 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. 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 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 "develop a coherent market strategy which will assist us in developing our import market in Asia and the Pacific rim and also in expanding our domestic market on the West Coast of the U.S." parallel the job responsibilities of a marketing manager or market research manager. Information in 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. Furthermore, although the record contains some job advertisements, the petitioner has not presented any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals 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.

Counsel cites unpublished AAU decisions, which have no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). Counsel states that the petitioner in one of the unpublished decisions was an apparel products and diversified investments firm and another was a small investment firm. Counsel does not, however, demonstrate how such decisions are analogous to the present case.

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.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

Beyond the decision of the director, the petitioner's labor condition application was certified on November 24, 1998, a date subsequent to November 20, 1998, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As the director's decision will be affirmed on the grounds discussed, this issue need not be examined further.

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 decision of the Associate Commissioner dated July 5, 2000, is affirmed.