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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.  
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Washington, D.C. 20536



File: EAC-01-036-53030 Office: Vermont Service Center Date: 24 APR 2007

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:



Public Copy

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, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a business engaged in the wholesale and retail sale of leather accessories and fashion items. It has 4 employees and an approximate gross annual income of \$841,333. It seeks to employ the beneficiary as a business and marketing analyst for a period of three years. The director determined that the petitioner had not established that the offered 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 denied the petition because the duties of the offered position as described by the petitioner did not appear to be the duties of a market research analyst. On appeal, counsel argues that the Service has previously found that a petitioner's size, scope, and newness of operation are not dispositive in determining whether a position qualifies as a specialty occupation. Counsel states that small to medium size companies can only compete with large size companies by having the same qualified professional workers as those employed by larger companies. Counsel asserts that it is entirely reasonable and necessary for a growing organization such as the petitioner to utilize the services of a professional level business and marketing analyst in order to increase its market share and generate additional profits and revenue.

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:

The beneficiary will coordinate the marketing and sales operations by applying mathematical principles to organizational problems. He will research market conditions in national and international areas to determine potential customers with a view towards increasing market share and generating profits and revenues. He will analyze and gather data with respect to competitors and current market trends. He will monitor and recommend pricing and methods of marketing. He will develop and implement a detailed marketing and promotional strategy. He will analyze and evaluate special offers, pricing and sales. He will monitor and analyze marketing performance. He will confer with the employer's president, domestic and overseas suppliers to develop advertising, promotion and public relations activities, goals and policies.

The duties described, while quite detailed, are not the responsibilities of a market research analyst as set forth in the Department of Labor's (DOL) Occupational Outlook Handbook (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. At page 239 of the Handbook, the DOL states that "[m]arket, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales." The duties described by the petitioner are not related to the analysis of sales. Rather, the position being offered involves researching market conditions in national and international areas to determine potential customers with a view towards increasing market share and generating profits and revenues.

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 240, 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 the wholesale and retail sale of leather accessories and fashion items, employs approximately 4 persons and has a gross annual income of \$841,333. The business of wholesale and retail sale of leather accessories and fashion items 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 DOL at page 27 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 analyzing current market trends and developing a marketing strategy to increase market share and generate profits and revenues, parallel the job responsibilities of a marketing manager or market research manager. Information at page 28 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.

The petitioner states that it requires a minimum of a bachelor's degree in a related field for the proffered position. However, the petitioner has not submitted documentary evidence to demonstrate that it requires a bachelor's degree as part of the hiring process, such as copies of previous job announcements or public advertising for open positions.

Counsel states on appeal that the previous holder of the proffered position, [REDACTED] has a Bachelor of Science degree in Business Administration from the School of Business at Rutgers College, The State University of New Jersey. In support of his statement, counsel submits a photocopy of Mr. Gurdal's diploma and payroll records showing that [REDACTED] is an employee of Broadway Bags.

Although the petitioner may have previously hired an individual with a bachelor's degree in business administration for the proffered position, this fact alone does not serve to establish that the petitioner requires a bachelor's degree in a specialized area for the proffered position. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation.

The Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly

specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if the Service were to be limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the petitioner has previously hired an individual with a bachelor's degree in business administration for the proffered position, the position, nevertheless, does not meet the statutory definition of a specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has hired an individual with a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Counsel asserts that the degree requirement is common to the industry for parallel positions in similar organizations. In support of his assertion, counsel submits letters from [REDACTED]

[REDACTED] Both writers state that the leather industry is highly competitive and it is common for growing companies in the leather industry to employ a business and marketing analyst with a bachelor's degree in business administration or a related field. However, two letters do not exemplify the industry standard. Furthermore, the record contains no evidence to show that Sasha Handbags and Crown Travelware are similar to Broadway Bags in the number of employees and gross annual income. Therefore, these letters alone are not sufficient to show that the degree requirement is common to the industry in parallel positions among similar organizations.

On appeal, counsel submits 5 internet job advertisements for market analyst positions. Two of the positions have duties which appear to be similar to those of the proffered position. Both prospective employers state that they require a college degree plus prior experience. However, neither employer specifies that the

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<sup>1</sup> The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

degree must be in a specialized area such as business administration or marketing.

The other three advertised positions require a bachelor's degree in marketing, statistics, math, or a related field. However, these positions are not similar to the offered position because the duties of those positions appear to be the duties typically performed by a market research analyst. As stated above, the proffered position appears to be that of a marketing manager or market research manager rather than that of a market research analyst. Since the duties of these jobs are different from those of the proffered position, these ads do not serve to show that the degree requirement is common to the industry for parallel positions among similar organizations.

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.

Beyond the decision of the director, it is noted that the labor condition application submitted by the petitioner was not certified by an authorized Department of Labor official. 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. Since this has not occurred, it is concluded that the petition may not be approved for this reason as well.

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.