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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



DEC 27 2002

File: LIN-01-081-54809

Office: Nebraska 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)

IN BEHALF OF PETITIONER:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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 marketing consulting business with 48 employees and a gross annual income of \$6,730,000. It seeks to employ the beneficiary as an associate consultant for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a brief.

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 petitioner had not demonstrated that the proffered position requires a baccalaureate degree in a specific specialty. The director further found that the petitioner had not demonstrated that the beneficiary's baccalaureate degree in business administration qualifies her for the proffered position. On appeal, counsel states, in part, that the proffered position is similar to that of a market research analyst, an occupation that requires a baccalaureate degree or an equivalent thereof, according to the Department of Labor (DOL) in its Occupational Outlook Handbook (Handbook). Counsel additionally states that the petitioner requires a degree in business administration or a closely related field of the social sciences in order to be hired as an Associate Consultant. Counsel further states that the beneficiary qualifies for the proffered position because she holds a baccalaureate degree in business administration conferred by a U.S. institution of higher learning.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job 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:

As an Associate Consultant, [the beneficiary] will be responsible for working on distribution channel client engagements as a team member working under a Senior Consultant or for a Shareholder. She will be required to address project issues usually associated with problems in the client's "go to market" process. That is, how the business sells its products or services to another business, often involving a third party distributor, dealer or agent . . .

In the capacity of Associate Consultant, [the beneficiary] will be expected to perform the following duties under the direction of a Project Manager: conduct basic marketing research, probe for quantitative information on the telephone, perform qualitative interviews in a structured environment, independently locate and collect secondary source data/information, verbalize findings in an organized manner, summarize information in written, organized manner for team debriefs, and create and fill tab sheets to capture quantitative interview data. In addition, she will be responsible for maintaining an accurate summary of progress with regard to the tasks outlined above.

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 petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the beneficiary is a market research analyst, an occupation that would normally require a bachelor's degree in accounting or a related field. In its Handbook, 2002-2003 edition, at page 239, the DOL describes the job of a market research analyst, in part, as follows:

[Market research analysts] analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Like economists, market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, personal, or mail interview surveys to assess consumer preferences. Trained interviewers, under the market research analyst's direction, usually conduct the surveys. (Emphasis added.)

After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services...

The record contains no evidence that the position offered includes complex or advanced market research analyst duties such as devising methods and procedures for obtaining the data and designing telephone, personal, or mail interview surveys to assess consumer preferences, or that the position requires an individual with a knowledge of sophisticated marketing analyst techniques normally associated with the duties of a market research analyst.

The duties that the petitioner endeavors to have the beneficiary perform are the information soliciting duties, which are similar to the duties that an interviewer would execute in a market research business. In contrast to the description of a market research analyst, at page 403 of the Handbook, the DOL describes the positions of an interviewer, in part, as follows:

Interviewing clerks who conduct market research surveys and polls for research firms have somewhat different responsibilities. These interviewers ask a series of prepared questions, record the responses, and forward the results to management. They may ask individuals questions about their occupation and earnings, political preferences, buying habits, customer satisfaction, or other aspects of their lives. Although most interviews are conducted over the telephone, some are conducted in focus groups or by randomly polling people in a public place...

The types of duties the petitioner ascribes to the beneficiary fall within the scope of an interviewer position rather than a market research analyst position. For example, the petitioner states that the beneficiary will "probe for quantitative information on the telephone, perform qualitative interviews in a structured environment..." and "create and fill tab sheets to capture quantitative interview data." Such duties are not duties normally associated with a market research analyst. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, although the petitioner's past hiring practices indicate that it normally requires a baccalaureate degree in business administration or a closely related field of the social sciences for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. 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. As with employment agencies as petitioners, 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.¹ To interpret the regulations any other way would lead to absurd results: if the Service was 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 claimed to have hired only individuals with a bachelor's degree in business administration or a closely related field of social sciences for its associate consultant positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the

¹ 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.

petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

Third, the petitioner did not present 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The job fits the description of an interviewer, rather than a market research analyst. According to the DOL at page 396 of the Handbook, the usual requirement for an information and record clerk [interviewer] is a high school diploma or its equivalent. A higher level of training is favored but not required, and such training is available in community colleges or schools of business. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.

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.

ORDER: The appeal is dismissed.