



DZ

U.S. Department of Justice

Immigration and Naturalization Service

Verdict: Case 0210118
1-2-02 10:41 AM
INVESTIGATION PERSONNEL

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



File: EAC-01-138-50700 Office: Vermont Service Center

17 MAY 2002
Date: 17 MAY 2002

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 J. 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 provides travel-related services to companies and individuals. It has 35 employees and a gross annual income of \$15 million. It seeks to employ the beneficiary as a business 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 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 duties described by the petitioner appeared to relate to the jobs of a marketing manager and a travel agent, positions that do not qualify as specialty occupations. On appeal, counsel states, in part, that the proffered position is that of a market research analyst. Counsel submits an expanded description of the duties the petitioner anticipates the beneficiary would perform as a market research analyst. Counsel further states that the proffered position is so complex as to require a baccalaureate degree in business administration.

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:

- (1) Examine and analyze research data to forecast future trends in the travel industry;

- (2) Collect, compile, classify and analyze data on customer preferences;
- (3) Analyze the design, promotion, price and distribution of our service lines in order to ensure increased sales and profitability;
- (4) Identify and define market opportunities in order to focus, create and implement appropriate strategies and responses;
- (5) Generate, refine and evaluate marketing actions and strategies;
- (6) Monitor our marketing performance and study marketing strategies to determine their effectiveness;
- (7) Collect data on customer preferences, study various factors such as region, company income and level of needs and market products accordingly in that area;
- (8) Monitor our market performance and study marketing strategies, and conduct profitability studies to support development and investment opportunities with a view towards modifying and improving tactics to increase sales in ticketing and overall market share;
- (9) Establish research methodology and design format using information sources and marketing trends.

The duties described, while quite detailed, are not primarily 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. 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 a travel business, employs 35 persons and has an approximate gross annual income of \$15 million. The travel business 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 "[g]enerat[ing], refin[ing] and evaluat[ing] marketing actions and strategies" and "[m]onitor[ing] our marketing performance and study[ing] marketing strategies to determine effectiveness," 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, 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 has provided a letter from an academic expert and two letters from individuals involved in the travel industry. All state that the usual requirement for positions such as the proffered position is a baccalaureate degree in business administration or an equivalent thereof. Three letters are insufficient evidence of an industry standard. The writers have not provided evidence in support of their assertions. In addition, none of the writers have

indicated the number or percentage of persons holding positions similar to the proffered one who hold such degrees.

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, the petitioner's labor condition application was certified on July 17, 2001, a date subsequent to March 23, 2001, 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 this matter will be dismissed 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 appeal is dismissed.