

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536



DEC 03 2003

FILE: EAC 01 093 53715 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)

ON BEHALF OF PETITIONER:



ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE
DATE 03/15/2003 BY 60322/UC/STP
REASON: OF PERSONAL PRIVACY

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner is an import/export business for apparel and accessories. It employs 2 people and has a gross annual income of more than \$1,000,000. It seeks to temporarily employ the beneficiary as a marketing consultant for a period of three years. The director determined that the petitioner had not established that the position exists, and therefore it could not be determined to be a specialty occupation.

On appeal, counsel asserts that the director erred in determining that the position is not a specialty occupation.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

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 first issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Vermont Service Center on February 2, 2001, the petitioner described the duties of the proffered position as follows:

- a) Gather data on competitors and analyze prices, sales, and methods of marketing and communication,
- b) Plan, design, and conducts [sic] research in import and export market [sic] and in solution of problems arising from production and distribution of goods and services,
- c) Collect data on clients [sic] preferences and buying habits,
- d) Prepare reports that summarize and forecast business activities and its financial position in the areas of income, expenses, and earnings based on present and expected transactions,
- e) Collect data and compile information and aid in conducting sales to new and existing clients using market information designed towards specific target groups,
- f) Research, identify and define international market conditions and opportunities in order to generate, focus, create and implement appropriate strategies and responses,
- g) Track trends in time periods from season to season and year to year, types of merchandise ordered,

- range of sales price point [sic] ordered, and other factors,
- h) Responsible for researching data on prices, market conditions, future marketing trends for the import and export industry and monitoring marketing design performance,
 - i) Assist in direction of production activities to maintain adequate merchandise flow of materials and resolve purchase problems,
 - j) Review and analyze marketing data in order to prepare reports detailing results of investigation, and to stay abreast of import and export market changes,
 - k) Prepare reports and graphic illustration of findings.

In response to the director's request for evidence, the petitioner provided a significantly more extensive overview of the proffered position, detailing the particular projects and research the beneficiary would undertake as a marketing consultant (Exhibit E).

In his decision, the director stated, "A review of service records does not indicate your concern is doing business in a manner that would require the services of a professional marketing consultant." This is not an element of the H-1B adjudication, and it is not for Citizenship and Immigration Services (CIS) to make a determination as to the business necessity of a given position in adjudicating this classification of visa petition. The petitioner does, of course, need to establish that the position actually exists. The director goes on to state, "The deficiency of the immediate petition is this service is not persuaded the beneficiary will actually be employed in the capacity indicated, that is to perform services of the specified 'specialty occupation.' The evidence of record does not establish the job offered qualifies as a 'specialty occupation.'" It is not clear from this statement whether the director determined that the proffered position is not a specialty occupation or whether the position is a specialty occupation but the petitioner had not proven that the beneficiary would be performing those specific duties.

In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Citizenship and Immigration Services (CIS) often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

The proffered position is a marketing consultant. The 2002-2003 edition of the *Handbook* describes the basic duties of a marketing manager on page 27, and those of a market research analyst on page 239. The position as described by the petitioner appears to match that of a market research analyst more closely than a marketing manager. The *Handbook* describes the duties of a market research analyst:

They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sale, and methods of marketing and distribution. Like economists, market research analysts devise methods and procedures for obtaining the data they need. . . . After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon their findings.

The *Handbook* indicates that "[g]raduate education is required for many private sector economist and market and survey research jobs. . . . Market and survey researchers may earn advanced degrees in economics, business administration, marketing, statistics, or some closely related discipline."

Given this information, a graduate degree would be the minimum requirement for entry into a position as a market research analyst; the position is a specialty occupation.

The petitioner has established that the offered position is a specialty occupation within the meaning of the regulations. Nevertheless, the petition may not be approved at the present time. The second issue is whether the beneficiary is qualified to perform this occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree

required by the specialty occupation from an accredited college or university;

3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

As the proffered position is a market research analyst, the beneficiary must possess a master's degree, or its equivalent, in economics, business administration, marketing, statistics, or some closely related discipline.

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary holds a bachelor's degree from Hansung University and a Master of Business Administration from the University of Seoul, both in Korea; the beneficiary does not meet this criterion.

2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The proffered position is as a marketing consultant, although the position description most closely resembles that of a market research analyst. The beneficiary's undergraduate degree is in business administration, and his graduate degree is in business administration with a concentration in tax management.

Counsel submitted an assessment from Harry Stucke, of International Credentials Evaluation and Translation Services. This assessment determined that the beneficiary has the equivalent of a bachelor of business administration degree from a United States institution. Additionally, Mr. Stucke evaluated the beneficiary's 10 years and four months of experience in marketing and determined it to be the equivalent of "three years of academic study towards a Bachelor of

Business Administration Degree in Marketing from an accredited institution of tertiary education in the United States."

Mr. Stucke is qualified to make the determination that the beneficiary's degree is equivalent to a U.S. degree, but is not qualified to make the determination that his work experience is equivalent to academic study. The regulations state that such a determination must be made by:

[A]n official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The evaluator's resume indicates that he is the Chair, Managerial Science Department and Director of the M.B.A. program at Long Island University, Rockland Campus. There is no indication that he has "authority to grant college-level credit for training and/or experience in the specialty," or that the university at which he teaches "has a program for granting such credit based on an individual's training and/or work experience," as required by the regulations.

No equivalency assessment was submitted for the beneficiary's M.B.A. degree, and in reviewing the beneficiary's transcript, the coursework is solely comprised of tax and accounting classes. It is not clear on its face that this coursework would equate to a master's of business administration from a United States university.

3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

This occupation does not require a State license, registration, or certification.

4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

This is the only criterion that the beneficiary could meet. In considering whether the beneficiary qualifies under this category by virtue of his education, practical experience, and/or specialized training, 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

[E]quivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience.

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized

training and/or work experience must be demonstrated for each year of college level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Counsel has submitted two letters from former employers as well as the evaluation from the credentials evaluator. The letter from B.C. Lee of Han Neung Co., Ltd. does not indicate that the beneficiary has the skills required for the proffered position. In addition, it lacks detail, as well as any indication of the writer's qualifications, and therefore does not meet the terms of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i). The letter from D.K. Song, the president of Dong Joo Corporation, does indicate that the beneficiary has expertise in marketing, as required by the specialty occupation, but does not provide enough detail, nor does it state the writer's qualifications to make such an assessment. Finally, the evaluation from Harry Stucke was not adequate for determining that the beneficiary had the equivalent of a master's

degree pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), and it also does not provide adequate information under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i). The petitioner has not established that the beneficiary is qualified to perform the specialty occupation of marketing consultant (market research analyst).

As the director did not discuss the beneficiary's qualifications, however, the matter will be remanded to the director for further consideration. The director must afford the petitioner reasonable time to provide evidence pertinent to the issue of the beneficiary's previous education, training and work experience, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's August 10, 2001 decision is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.