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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



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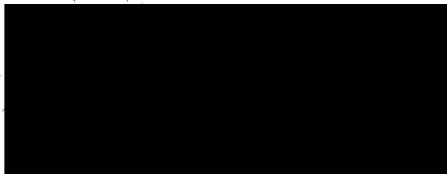
DATE: JAN 22 2003

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 USC 110(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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Texas Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a travel agency with "4+" employees and a gross income of \$3,845,843. It seeks to employ the beneficiary as a marketing manager for three years.

The acting director denied the petition because he found that the petitioner had failed to demonstrate that the proffered position is a specialty occupation.

On appeal, the petitioner submits a brief.

Section 101(a) (15) (H) (i) (b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a) (15) (H) (i) (b), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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

(A) theoretical and practical knowledge 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.

8 C.F.R. 214.2(h) (4) (ii) further 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.

In the initial petition, the petitioner stated that the duties of the proffered position are to:

. . . identify and define marketing opportunities; supervis(e) sales activities; conduct market analysis of international and domestic routes; conduct market

analysis and gather information relating to fares, hotels & restaurants, local customs, tourist attractions, special events, customs regulations and currency exchange regulations, analyze competitor's marketing programs and compile, synthesize and analyze; formulate and implement data collection and management methods; monitor regulatory changes in the industry, prepare strategies to minimize impact of regulatory changes on the existing business, and evaluate and review budget and (sic) internal control function.

The petitioner stated that the proffered position requires a bachelor's degree in business administration or marketing.

With the petition, the petitioner provided an educational evaluation. The evaluator stated that she had reviewed the beneficiary's credentials from Pakistan, and that they demonstrate that the beneficiary completed the two-year bachelor of science program at the University of Karachi and is eligible for two years of transfer credits, or 64 semester hours, at a U.S. undergraduate institution.

The evaluator further stated that:

For professional purposes, (the beneficiary) has achieved mastery of skills which are represented by another 60 semester hours . . . to yield an overall-hour count of 124 for the Bachelor of Business Administration degree equivalency.

The evaluator then listed 16 college classes, for a total of 60 semester hours, to which she deemed the beneficiary's business experience to be equivalent.

The acting director requested the petitioner to submit additional evidence pertinent to the proffered position. Specifically, the acting director requested evidence that the proffered position is a specialty occupation and meets one of the alternative criteria of 8 C.F.R. 214.2(h) (4) (iii) (A), below.

Further, the acting director noted that three years of specialized training and work experience might be substituted for one year of college-level training. The director requested that the petitioner submit letters from the beneficiary's previous employers to demonstrate the period of his employment with them and the duties of his positions.

The acting director also noted that the Labor Condition Application submitted with the petition was not certified by the Department of Labor, and requested that the petitioner provide a certified Labor Condition Application.

In response, counsel for the petitioner provided what purported to be letters from two travel agencies in Pakistan. One of those agencies stated that it employed the beneficiary for eleven months, the other for almost 57 months, for a total of more than six years.

The first of those letters stated that the beneficiary's duties included:

. . . gathering information relating to fares, hotels and returants (sic), local customs, tourist attractions, special events, customs regulations and currency exchange regulations. Other duties also included supervising sales activities; identifying and defining marketing opportunities, conducting market analysis of domestic routes; conducting market analysis of international routes; evaluating and reviewing the budget. Another duty was to monitor (the effect of) regulatory changes on the business. All these duties also included analyzing competitors marketing programs and compiling, synthesizing and analyzing, formulating and implementing data collection and management methods.

The second letter stated that the beneficiary's

Responsibilities included were (sic) to identify and define marketing opportunities; (s)upervise sales activities; conduct market analysis of domestic routes; conduct market analysis of international routes. Other responsibilities included included (sic) to gather information relating to fares, hotel(s) & resturants (sic), local customs, tourist attractions, special events, customs regulations and currency exchange regulations. All these duties also included analyzing competitor's (sic) marketing programs and compiling, synthesizing and analyzing, formulating and implementing data collection and management methods. Monitoring regulatory changes in the industry and preparing strategies to minimize impact of regulatory changes on the business. Another duty was to evaluate and review budget.

Counsel also provided part of the section of the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) pertinent to advertising, marketing, promotions, public relations, and sales manager positions, thereby implicitly suggesting that those positions are parallel to the proffered position. Counsel cited that section of the Handbook for the proposition that the position of marketing manager requires a minimum of a bachelor's degree. The content of that section of the Handbook is discussed below.

Counsel named the person who worked as marketing manager for the petitioner from February 1998 to February 2001 and stated that "his education was equivalent to a Bachelor's Degree in Marketing Manager." Finally, counsel submitted an approved Labor Condition Application.

The acting director denied the petition on the basis that the petitioner did not establish that the proffered position is a specialty occupation.

On appeal, counsel restates the duties of the proffered position and the view of the petitioner that those duties require a bachelor's degree in economics or marketing.

Counsel also cites In re: X, 14 Immig. Rptr. B2-122 (March 31, 1995), a case in which the Administrative Appeals Office (AAO) sustained an appeal in which the petitioner, a travel agency, sought to employ a beneficiary as a business analyst. Counsel states that the duties of the proffered position in that case are identical to the duties of the proffered position in the instant case.

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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Counsel's contention that the proffered position is a specialty occupation is unconvincing. 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. 8 C.F.R. 214.2(h)(4)(iii)(A)(1).

The Service often consults the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) when determining whether a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into a particular position.

Counsel initially implied that the proffered position should be analyzed as a sales manager position, but on appeal asserts that the position is a marketing research analyst position.

In the 2002 - 2003 edition of the Handbook at page 28, the DOL states the following about the duties of marketing research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical 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.

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 information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Analysts may conduct opinion research to determine public attitudes on various issues, which may help political or business leaders and others assess public support for their electoral prospects or advertising policies.

The petitioner used many of the same key words in describing the duties of the proffered position. The petitioner stated that the beneficiary would conduct market analysis of international and domestic routes, conduct market analysis and gather information relating to fares, hotels & restaurants, local customs, tourist attractions, special events, customs regulations and currency exchange regulations, analyze competitor's marketing programs and

compile, synthesize and analyze; formulate and implement data collection and management methods.

However, the Handbook, at page 149, provides insight into the types of industries in which market research analysts are typically 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, a travel agency, employs "4+" people and has a gross annual income of \$3,845,843. Travel agencies are 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. The Service is not persuaded to label the offered position as a market research analyst position. Given the needs typical to travel agencies, the duties of the proffered position appear to be to gather price information and other information about travel and to market travel services to the public.

The Handbook, at page 376, states the following about the duties of travel agents:

Constantly changing airfares and schedules, thousands of available vacation packages, and a vast amount of travel information on the Internet can make travel planning frustrating and time-consuming. To sort out the many travel options, tourists and business people often turn to travel agents, who assess their needs and help them make the best possible travel arrangements. Also, many major cruiselines, resorts, and specialty travel groups use travel agents to promote travel packages to millions of people every year.

In general, travel agents give advice on destinations and make arrangements for transportation, hotel accommodations, car rentals, tours, and recreation. They also may advise on weather conditions, restaurants, tourist attractions, and recreation. For international travel, agents also provide information on customs regulations, required papers (passports, visas, and

certificates of vaccination), and currency exchange rates.

Travel agents consult a variety of published and computer-based sources for information on departure and arrival times, fares, and hotel ratings and accommodations. They may visit hotels, resorts, and restaurants to evaluate their comfort, cleanliness, and the quality of food and service so that they can base recommendations on their own travel experiences or those of colleagues or clients.

Travel agents also promote their services, using telemarketing, direct mail, and the Internet. They make presentations to social and special-interest groups, arrange advertising displays, and suggest company-sponsored trips to business managers. Depending on the size of the travel agency, an agent may specialize by type of travel, such as leisure or business, or destination, such as Europe or Africa.

The duties of the proffered position appear to be very like those of a travel agent. At page 377, the Handbook states that "(t)he minimum requirement for those interested in becoming a travel agent is a high school diploma or equivalent." The Handbook does not support the contention that the proffered position requires a bachelor's or higher degree in a specific specialty.

II. 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. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

Factors often considered by the Service when determining the industry standard include: whether the DOL's Handbook reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D. Minn. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp.2d 872, 1102 (S.D.N.Y. 1991)).

The DOL's conclusions pertinent to a degree requirement for the proffered position were discussed in the previous section, and shall not be repeated here. Neither counsel nor the petitioner presented any evidence that any association of travel agents has instituted a degree requirement for membership.

Nothing in the description of the proffered position indicates that the petitioner's business is especially complex or unique, such that it would require a baccalaureate degree in a specialized field of study.

III. The employer normally requires a degree or its equivalent for the position. 8 C.F.R. 214.2(h)(4)(iii)(a)(3).

On appeal, counsel names a person who previously worked in the proffered position and states that this person's education is the equivalent of a "Bachelor's Degree in Marketing Manager." The assertions of counsel, however, do not constitute evidence. Matter of Obiagena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&S Dec. 503, 506 (BIA 1980). Neither the petitioner nor counsel has offered any evidence that the petitioner normally requires a degree or its equivalent for the proffered position. No documentary evidence of the academic credentials of the petitioner's prior employee are included in the record.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. 214.2(h)(4)(iii)(A)4).

In this matter, the evidence demonstrates that the petitioner has exaggerated the duties of a travel agent position in an attempt to classify the position as that of a market research analyst. Counsel's reliance on In re: X, supra. for the proposition that the proffered position is a specialty occupation is inapposite, absent any indication that the facts in that matter are similar to the facts of the instant case.

Counsel has provided no evidence that the proffered position is vastly more specialized and complex than other travel agent positions.

Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation. The critical element is not the title of the position, 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 a minimum for entry in the occupation as required by the Act. 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 F3d 384 (5th Cir. 2000). In this case, the petitioner has not shown that the practice of the proffered position requires the attainment of a bachelor's degree in a specific specialty.

Beyond the decision of the director, a discrepancy exists between the date the petition in this matter was filed and the date the Labor Condition Application was certified. 8 C.F.R. 214.2(h)(4)(i)(B)(1) states that:

Before filing a petition for H1-B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The petition in this matter was filed on July 31, 2001. The labor condition application submitted by the petitioner was certified on August 23, 2001, a date subsequent to the filing date of the petition. The record does not demonstrate that the petitioner obtained the certification before filing the petition as required by 8 C.F.R. 214.2(h)(4)(i)(B)(1).

Additionally, the two letters from alleged previous employers are strikingly similar, both in format and in content. Those letters described the duties of the beneficiary's previous positions using many of the same phrases, though arranged differently. Those same phrases also appear in the materials submitted by the petitioner. The letters are in the same type face and both are in modified block style. The letterheads are similar and both letters use the salutation, "Dear Sir/Madam." Those letters made some similar grammatical errors and the word "restaurant" is misspelled in both. The obvious implication is that both letters were dictated by the same person, and typed by the same person on the same computer or typewriter, which raises a suspicion of collusion, at the very least.

Further, the educational evaluator expressed the opinion that the beneficiary, in his work experience with two travel agents in Pakistan, had achieved a "mastery of skills" which is the equivalent of 60 semester hours of study in 16 different undergraduate classes, including Accounting, Cost & Management Accounting, Principles of Economics, Principles of Management, Principles of Marketing, Business to Business Marketing, Organizational Behavior & Management, Introduction to the Environment of Business, Operations Management & Practice, Marketing Administration, Marketing Planning & Strategy, New Product Development, Entrepreneurial Costs and Budgets, Employee & Labor Relations, Management Training, and Entrepreneurship.

How the educational evaluator tested the beneficiary's "mastery of skills" or otherwise arrived at the conclusion that the beneficiary's work experience is equivalent to those specific classes is unstated.

This Service uses an independent evaluation of a person's credentials as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be rejected or given less weight. See Matter of Sea, Inc., 19 I&N Dec. 817 (Comm. 1988). In the absence of any documentary evidence to support the conclusion of the educational evaluator in this matter, that conclusion is not accorded any weight.

Finally, the beneficiary's transcripts and diploma were not included with the petition and are not in the record. The absence of those documents is another serious flaw in the petitioner's evidence in support of the assertion that the beneficiary is qualified to perform services in a specialty occupation. That issue need not be further addressed, however, in view of the finding that the proffered position is not a specialty occupation.

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.