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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

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



MAR 26 2003

File: EAC 01 036 53055

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:



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 Bureau of Citizenship and Immigration Services (Bureau) 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, 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 appeal will be dismissed.

The petitioner is a New York food products importer and wholesale company established in 1985 that has four employees and a gross annual income of \$1,900,000. It seeks to temporarily employ the beneficiary as a business analyst for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the position of business analyst is a specialty occupation and submits documentation on the previous business analyst employed by the petitioner.

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 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 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 issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation. In the original petition received by the Vermont Service Center on November 17, 2000, the petitioner described the proffered position of business analyst and explained the duties of the proffered position as follows:

The beneficiary will formulate and establish organizational policies and operating procedures for the petitioner to assure the quality of its food products and increase sales and profitability. He will implement and coordinate the petitioner's product assurance program to prevent and eliminate the various defects in food products. He will oversee product-pricing decisions. He will analyze and compare sales, budgets, cost and profits. He will formulate overall product strategies. He will assess customer need and requirements. He will analyze customer complaints and returns. He will establish customer database software. He will develop and coordinate new sales coordination system.

The beneficiary will analyze and gather data with respect to competitors and current market trends. He will develop and implement a detailed marketing and promotional strategy. He will monitor and analyze marketing performance. He will confer with the petitioner's president, domestic and overseas suppliers to develop advertising, promotion and public relations activities, goals and policies.

The position of business analyst is a specialty occupation because it requires [at a minimum] a bachelor's degree in a related field or equivalent experience.

The petitioner also submitted an educational equivalency document from the [REDACTED] Corporation in New York, that indicated the beneficiary's bachelor of science degree in industrial engineering was the equivalent of a bachelor's degree from an accredited university in the United States. In addition, the petitioner submitted the beneficiary's resume with information on his previous work experience and training.

On February 6, 2001, the director asked for further information with regard to the instant petition. First, the director stated that the petitioner "had few employees and reports modest or projected gross annual income." Based on this, the director stated that it was not apparent that the petitioner was capable of providing H-1B employment to the beneficiary for the requested period of time. The director then asked the petitioner to submit evidence that the petitioner had sufficient work and resources available to employ the beneficiary in a specialty occupation for the requested period of employment.

Second, the director requested more information as to whether the proffered position was a specialty occupation. The director requested a detailed statement on the beneficiary's proposed duties and responsibilities and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested more evidence with regard to whether the petitioner and other companies within the petitioner's industry require a bachelor's degree in a specific field of study for entry into the proffered position. Finally, the director requested more evidence with regard to other persons employed in similar positions by the petitioner. Evidence requested included the number of individuals employed in similar positions in the past two years, with the degrees that they hold, as well as pay stubs or Form W-2s as proof that the petitioner employed these workers.

In response, the petitioner submitted the following documentation:

- A letter from the petitioner describing the food import industry, its hiring policies along with a percentage breakdown of the duties and responsibilities of the beneficiary as well as comments on the beneficiary's relevant work background.
- A letter from a food products import and sales company with regard to the industry standard for business analysts.
- Copies of the petitioner's corporate tax return for the period ending on May 30, 1999, as well as a balance sheet as of October 31, 2000 to establish the petitioner's high volume of operations and financial strength. Bills of lading for various business transactions from 2001 were also enclosed.
- An excerpt from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* with regard to operations research analyst positions and an excerpt from the DOL's *Dictionary of Occupational Titles (DOT)* with regard to market research analyst positions.

With regard to the percentage of time spent in various duties by the beneficiary, the petitioner provided the following information:

Forty percent of [the beneficiary's] time will be spent:

- Coordinating [the petitioner's] business operations specifically in the areas of marketing, and sales administration for a sales volume of around \$2 million.
- Establishing and coordinating a management information system to organize the vendor, products and customers contacts.
- Designing, analyzing, and testing [the petitioner's] warehouse layout system.

Forty percent of [the beneficiary's] time will be spent:

- Evaluating sales guidelines and procedures and formulating new strategies and goals as needed.
- Evaluating [the petitioner's] performance and developing and implementing remedies as necessary to improve performance.
- Directing and reviewing the development and implementation of sales plans and strategies to expand [the petitioner's] operations in the U.S. market.
- Coordinating the sales and project activities in national market projects with the [the petitioner's] staff and customers across the United States.

Twenty percent of [the beneficiary's] time will be spent:

- Conducting sales and technical personnel evaluations.
- Reviewing and implementing marketing plans and strategies.

The petitioner also stated that it had employed another person, [REDACTED] in a similar position within the past year. According to the petitioner, this individual had a bachelor's degree in business management and a master of business administration degree.

On July 6, 2001, the director denied the petition. The director noted that the petitioner's other employees did not hold positions similar to the proffered position, and that the excerpt from the DOL *Handbook* had not established that a bachelor's degree was a standard minimum requirement for the sales manager/sales representative position. The director did not accept the one letter from the president of another food import company as evidence of an industry wide requirement to hire persons with bachelor's degrees in a specific specialty for the sales

representative/sales manager position. In addition, the director stated that the *Handbook* excerpt on market research analysts indicated that a graduate degree is required for entry into such a position. Due to the size of the petitioner, the director determined that the petitioner did not appear to require the services of a professional market research analyst. The director added that if the petitioner was willing to hire an individual with a bachelor's degree, the proffered position did not appear to be a genuine market research analyst position.

On appeal, counsel asserts that the size of the petitioner should not be used to discriminate against it. Counsel asserts that the Administrative Appeals Office has previously found that factors such as size, scope and newness of operation are not dispositive factors with regard to whether a market research analyst is a specialty occupation. In addition counsel submits copies of eight Internet advertisements in various industries that hire business and market analysts. Finally counsel provides documentation of its earlier assertion that the petitioner had required a degree in hiring its previous business analyst by submitting a copy of the previous business analyst's graduate degree in business administration in information sciences from Southeastern University.

Counsel correctly asserts that the size of a company or the fact that it is a new company are not necessarily determining factors in whether a job would qualify as a specialty occupation. *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal 1989). In addition, the petitioner asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the Department of Labor's *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991). However, the *DOT* is not considered a persuasive source of information regarding whether a particular job 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.

The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O\*Net)*. Both the *DOT* and *O\*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The Department of Labor's *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, the Bureau is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

The Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services, (Bureau) 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 petitioner has described the proffered position as a business/marketing analyst and also as an operations research analyst. Another *Handbook* classification that appears analogous to the proffered position is sales manager. Upon review of these classifications, it appears that the proffered position is an amalgam job that contains overlapping responsibilities from several *Handbook* classifications in the areas of business operations and sales management. For example, the job description submitted in response to the director's request for further information appeared to show that up to eighty percent of the beneficiary's time would be involved in sales and marketing operations. Within the sales and marketing work, the beneficiary would be called upon to evaluate sales guidelines, the petitioner's business performance, and to review and implement implementation of sales plans and strategies. These duties would necessarily entail some review or analysis of present systems in order to improve or expand them.

Nevertheless, the job description contains no information with regard to any statistical work or data or reports that the beneficiary would generate that might support the proffered position being that of a market research analyst. In addition, the position as described in the instant petition does not indicate any type of research endeavors that are analogous to those undertaken by an operations research analyst for either a large or small business. Without more persuasive evidence, the proffered position appears to be that of a sales or marketing manager who is also responsible for gauging the success of the petitioner's current business strategies. The *Handbook* indicates on page 28 that a wide range of educational backgrounds are suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. This range of educational possibilities clearly documents that a baccalaureate or higher degree or its equivalent in a specific specialty is not required for sales or marketing manager positions. Accordingly, pursuant to the first criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), the petitioner has not established that a baccalaureate in a specific specialty is required for entry into the proffered position. (Emphasis added.)

With regard to the second criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), namely, that the degree requirement is common to the food import and wholesale industry in parallel positions, the petitioner submitted a letter from the president of another food import business who stated that the minimum qualification for the position of business analyst was a bachelor's degree in a related field. The writer added that "those skilled in quantitative techniques with a strong background in business management,

administration, marketing, engineering, and mathematics have the best opportunities." In addition, when the director determined that this letter was insufficient evidence, the petitioner submitted eight Internet job advertisements for various categories of marketing and operations analysts. Both the initial letter and the Internet job vacancies supported the need for a bachelor's degree as a minimum requirement; however, they did not identify any specific specialty as the minimum requirement. The president of the food import company stated that the bachelor's degree should be in "a related field", while the Internet advertisements mentioned, among a range of bachelor's degrees, "a degree in marketing," "a bachelor's degree and at least 1 year consumer sales analysis experience, and "a bachelor of science degree in statistics, operations research, mathematics or marketing, with a master of science or master of business administration being desirable." As stated previously, the statute establishes that the petitioner must show that the proffered position requires a baccalaureate or higher degree or the equivalent, in a specific specialty. (Emphasis added.) To interpret the criteria in 8 C.F.R. 214.2(h) (4)(iii) (A) as solely requiring a bachelor's degree is an incorrect interpretation.

With regard to the third criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), namely, that the employer normally requires a degree or its equivalent for its business analyst position, the petitioner submitted the educational credentials of its previous business analyst. As noted previously, the educational credential was for a master of science degree in business administration. The record to date indicates that the petitioner requires more than a bachelor's degree for entry into the proffered position. Without more persuasive evidence, the petitioner has not established the third criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A).

With regard to the final criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), namely that 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 description provided by the petitioner of the beneficiary's work duties does not document that the duties of the proffered position are any more specialized or complex than the duties of any other sales or marketing manager. While the description mentions work on a management information system, and design, analysis and testing of the petitioner's warehouse layout system, there is no further information provided as to why these duties would be seen as more specialized or complex than similar duties undertaken by other business or marketing managers within the food import industry. In addition, the petitioner's job description does not explain in more detail any unique statistical or analytical work to be performed by the beneficiary, or illustrate the complexity of the petitioner's international or national business and clients. Without more persuasive evidence, the petitioner has not established the specialized and complex nature of the duties to be performed by

the beneficiary.

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the evidence on the record is not persuasive that the beneficiary is qualified to perform the duties of the proffered position. 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.

While the record contains an educational equivalency document, this document does not establish that the beneficiary's degree in industrial engineering from a Turkish university is the equivalent of a bachelor of science or arts degree in a related field relevant to the proffered position.

In addition, although the record contains some information on at least seven years of work experience by the beneficiary in the business world, the record does not contain an evaluation of the beneficiary's educational background in combination with his employment experience, 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, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Without such documentation, the petitioner has not provided sufficient evidence to establish whether the beneficiary is qualified to perform the duties of the proffered position. As the appeal will be dismissed on other grounds, this issue will not be discussed 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 appeal will be dismissed.

**ORDER:** The appeal is dismissed.