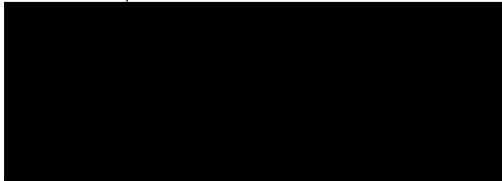


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U.S. Department of Homeland Security
Citizenship and Immigration Services

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536



FILE: SRC-01-279-51755 OFFICE: TEXAS SERVICE CENTER

DATE: OCT 29 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 U.S.C. § 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:



PUBLIC COPY

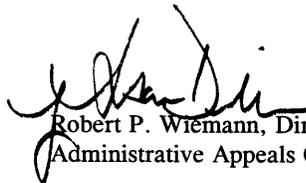
INSTRUCTIONS:

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 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, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is engaged in the import, export, sales and distribution of products that employs one person and has an undisclosed gross annual income. It seeks to employ the beneficiary as a market research analyst. The director denied the petition because the petitioner had not demonstrated that the offered position qualifies as a specialty occupation.

On appeal, counsel submits a brief. Counsel states, in part, that the position qualifies as a specialty occupation. Further, counsel maintains that the Immigration and Naturalization Service, now Citizenship and Immigration Services (CIS), had approved other, unrelated petitions, for the position of market research analyst.

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 for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as 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 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 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.

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's letter, dated September 17, 2001, described the position of market research analyst as follows:

[R]esearch market conditions in local, regional, or national area[s] to determine [the] potential sales of products or services. She will establish [the] research methodology and she will design [the] format for data gathering, such as surveys, opinion polls[,] or questionnaires. She will also examine and analyze statistical data to forecast future marketing trends. She will gather data on competitors and analyze customer preferences and buying habits.

Along with the petition, the petitioner submitted a copy of the beneficiary's bachelor's degree from Rafael Urdaneta University, Venezuela, in business administration.

On January 14, 2002, the director requested additional evidence from the petitioner: a copy of the articles of incorporation and marketing section of the business plan; copies of leases for both the administrative office and the warehouse; evidence that the petitioner has purchased electronic, computer, and agriculture equipment to export or, if not, an explanation along with evidence

of the results of both marketing and purchasing research and contract negotiations; names and addresses of current and potential distributors of electrical equipment; telephone invoices; and the beneficiary's letter of employment that stated the salary to be paid, the terms and conditions of employment, and has a detailed description of the position's responsibilities.

In response, the petitioner submitted the following copies: the articles of incorporation; a document from the Internal Revenue Service; the commercial lease; invoices in the Spanish language; a list of buyers; a list of names and addresses of current and potential distributors of electrical equipment; telephone invoices; and a letter, dated March 26, 2002, that is addressed to the Immigration and Naturalization Service, and signed by Alberto Macias. The letter stated the title of the offered position and the salary to be paid, and it also stated that its attachment listed the duties and terms of employment; however, the record does not contain the referenced attachment.

On May 16, 2002, the director denied the petition. The director found that the petitioner did not establish that the offered position qualified as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the nature of the position is not determined by its title, but by its duties and responsibilities, and the duties must be reasonable considering the employer's size, and its products and services. The director determined that the petitioner's business was small, had only one employee, and was in its early stage of development. Citing the Department of Labor's *Occupational Outlook Handbook*, (*the Handbook*), the director described some of the duties of a marketing manager and stated that, according to the *Handbook*, marketing managers work with subordinates and product development manager and market research managers to determine the demand for the products and services offered by a firm and its competitors. The director further stated that, according to the record, the petitioner had only one employee, the president; thus, there were no subordinates or department managers to collaborate with. The director stated that if a business had only two employees, both must share the tasks that need to be completed each day.

Further, the director stated that on January 14, 2002, the Service, now CIS, had requested evidence that would show how the specific duties of the offered position were so specialized and complex that the knowledge required to perform the duties was usually associated with the attainment of a baccalaureate in the specialty. The director also stated that the petitioner's response was the following evidence: the articles of incorporation that identified Alberto Macias as president and the beneficiary as the vice-president of the company; the warehouse lease; invoices that did

not show the petitioner's name; phone bills that showed the president's name, but not the petitioner's; and a letter of employment without a detailed description of the offered position. Furthermore, the director stated that the petitioner's representative claimed that the business plan had no marketing section.

Based on the record, the director determined that the petitioner's business, a start-up company, had no reasonable role for a market research analyst, and according to the articles of incorporation, the beneficiary's real title as vice-president made the beneficiary a business manager and not a market research analyst. In conclusion, the director determined that the petitioner did not establish that the nature of the position's duties were so complex that the incumbent required at least a bachelor's degree and had failed to show that the beneficiary would actually perform market research analysis instead of routine administrative duties.

On June 17, 2002, counsel submitted an appeal. In the appeal, counsel asserts that the petitioner had submitted all of the documents that the director requested; therefore, the director erroneously denied the petition by stating that the petitioner had failed to submit evidence. Counsel states that the petitioner's letter, dated March 26, 2002, complied with the director's request to give a detailed description of the position's duties. Further, counsel asserts that the petitioner had not received the director's request to furnish evidence that would show how the specific duties were so specialized and complex that the knowledge required to perform the duties was usually associated with the attainment of a bachelor's degree in the specialty. Counsel also asserts that the director is requesting documentation that applies to an L1 visa petition, not to an H-1B petition, and that a business plan is not necessary for H-1B classification. Counsel also asserts that the beneficiary's role as the vice-president of the petitioning company does not mean that the offered position is really for a business manager; the offered position is for a market research analyst. Finally, counsel asserts that the position of market research analyst is a specialty occupation and sites several cases that the Texas Service Center had approved.

Counsel's assertions on appeal are not persuasive. The petitioner has failed to satisfy at least one of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the position of market research analyst does not qualify as a specialty occupation.

The AAO does not simply rely on a position's title 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 AAO considers. Thus, the AAO does not rely on the titles of market research analyst or vice-president when determining whether a particular job qualifies as a specialty occupation.

The initial I-129 petition describes the offered position as follows:

[R]esearch market conditions in local, regional, or national area[s] to determine [the] potential sales of products or services. She will establish [the] research methodology and she will design [the] format for data gathering, such as surveys, opinion polls[,] or questionnaires. She will also examine and analyze statistical data to forecast future marketing trends. She will gather data on competitors and analyze customer preferences and buying habits.

The 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook*, (the *Handbook*), is instructive in determining whether a position qualifies as a specialty occupation. For the classifications of economist, market research analyst, and survey researchers, all located under the heading of economists and market and survey researchers, the *Handbook*, on page 239, states the following:

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

After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon their findings.

With regard to where market research analysts are employed, on page 240, the *Handbook* states:

Private industry provided about 9 out of 10 jobs for salaried workers, particularly economic and marketing research firms, management consulting firms, banks,

securities and commodities brokers, and computer and data processing companies.

The record shows that the petitioner is a start-up company, has one employee, has an undisclosed income, and is engaged in the import, export, sales and distribution of products. Under the *Handbook*, this kind of business is incongruous as to where a market research analyst is normally employed. Given the nature of the petitioning entity's business operations, the more appropriate classification of the offered position is marketing manager.

Under the *Handbook*, on page 27, marketing managers:

[D]evelop the firm's detailed marketing strategy. With the help of subordinates . . . they determine the demand for products and services offered by the firm and its competitors They identify potential markets - for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. . . . they monitor trends that indicate the need for new products and services.

The duties of the offered position reflect those of a marketing manager. For example, the beneficiary will research market conditions to determine potential sales, will monitor trends, and will analyze pricing.

On page 28, the *Handbook* states 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. For example, employers accept a bachelor's degree in sociology, psychology, literature, journalism, or philosophy. With marketing, sales, and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing.

The general trend is for many employers to accept candidates with experience in related occupations plus a broad liberal arts background. Whereas a smaller group of employers prefer candidates with a bachelor's or master's degree in business administration with an emphasis in marketing. The general trend contradicts the petitioner's assertion that a bachelor's degree in a specific specialty is normally the minimum requirement for entry into the offered position. Thus, the petitioner has not established the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The record also fails to establish the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that the particular position is so complex or unique that it can be performed only by an individual with a degree. Again, many employers accept candidates with experience in related occupations plus a broad liberal arts background.

The record shows that the offered position is newly created; therefore, the petitioner does not have a past practice of normally requiring a degree or its equivalent for the position.

The last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) states 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. As previously discussed, the record fails to show that the duties of the offered position are specialized and complex, requiring a bachelor's degree in a specific specialty.

Counsel asserts that it had not received the director's request to furnish evidence that would show how the specific duties were so specialized and complex that the knowledge required to perform the duties was usually associated with the attainment of a bachelor's degree in the specialty. The director's request for evidence, issued on January 14, 2002, sought to procure from the petitioner additional information about the general nature of its business operation, and, more specifically, a detailed job description of its offered position.

Counsel states that the petitioner's letter of March 26, 2002 complied with the director's request to submit a letter of employment that gave a detailed description of the position's duties. The petitioner's letter stated that it had an attachment that provided a detailed description of the offered position's duties; however, as previously mentioned, the record does not contain the attachment to the petitioner's letter.

Counsel also asserts that the director is requesting documentation that applies to an L1 visa petition, not to an H-1B petition, and that a business plan is not necessary for H-1B classification. The director's request for evidence was designed to elicit additional evidence about the nature of the petitioner's business operations, which affects the offered position, and the nature of the offered position.

The second and final issue is counsel's statement that the instant petition should be approved because the Immigration and

Naturalization Service, now Citizenship and Immigration Services, had approved unrelated H-1B petitions for the market research analyst position in the past. To support this statement, counsel lists the other petition numbers. However, this record of proceeding does not contain all of the supporting evidence submitted to the Texas Service Center in the prior cases. In the absence of all of the corroborating evidence contained in the prior proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered position. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii).

After careful review of the entire record in this proceeding, the AAO has determined that the petitioner has failed to establish any of the four criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The petition is denied.