



U.S. Citizenship
and Immigration
Services



FILE: WAC 02 132 55053 Office: CALIFORNIA SERVICE CENTER Date:

APR 26 2004

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:



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prevent clearly unwarranted
invasion of personal privacy**

This is the decision of the Administrative Appeals Office 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.



Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition 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 a company that exports and distributes medical supplies and equipment. It seeks to employ the beneficiary as a market research analyst (technical market representative). The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel and the petitioner assert that the director's decision is based on the size of the petitioner, rather than the complex nature of the duties of the position.

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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support dated February 21, 2002; (3) the director's request for additional evidence; (4) counsel's letter, dated August 9, 2002, that responds to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a market research analyst. The petitioner also describes

the position as a technical market representative. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; and the petitioner's letters in support of the petition and in response to the director's request for further evidence. According to the initial petition, the beneficiary would perform duties that entail: providing international market evaluations for medical products, such as first aid kits, pregnancy test kits, and snakebite kits; representing the company at medical seminars and conferences and trade shows; researching and identifying potential market diversification; assessing labor markets to recruit, manage and direct local international sales associates; recruiting doctors internationally to conduct educational seminars; and providing liaison between suppliers and distributors.

In the petitioner's response to the director's request for further evidence, the petitioner stated that the beneficiary would spend 30 per cent of her work time researching and identify potential markets for product diversification with a focus on the Indian and Asian markets; 25 per cent of her time representing the petitioner at medical seminars, conferences and trade shows; 20 per cent of her time assessing the global markets for recruitment purposes; ten per cent of her time recruiting doctors; and 15% of her time doing sales and marketing. The petitioner added that the beneficiary would manage and direct the overseas local sales associates following their recruitment to establish subsidiary companies. The petitioner stated that the position required a minimum of a bachelor of science degree in a scientific field, such as biology, chemistry, zoology and customer service skills.

The director found that the proffered position was not a specialty occupation and referred to the description of market research analyst in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition. Based on this document, the director noted that the position of marketing analyst is usually found in firms such as economic and marketing research company, banks, securities and commodities brokers, and computer and data processing companies. The director did not find these industries analogous to the petitioner. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). In addition, the director also commented that the academic credentials required by the petitioner for the proffered position differed from those described in the *Handbook's* classification for market research analyst.

On appeal, the petitioner reexamines the duties of the proffered position and adds new duties, such as forming a committee of experts to apparently aid in providing solutions or improvement in services provided by the petitioner. Other new duties include forming a committee among the general civilian population to discuss ideas and find solutions in healthcare, organizing brochures and written materials for the general population to increase awareness, and conducting classroom training. The petitioner and counsel state that the director denied the petition based on the his determination that most marketing positions are found within large companies. Counsel and the petitioner also state that the petitioner's academic requirements for the position are not restricted to a specific degree in marketing as the more important skills to the marketing areas of the company are those acquired in pursuit of a scientific degree.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *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." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. With regard to the original duties of the proffered position, it appears to be an amalgam position within an export company that exclusively distributes basic medical supplies. The position combines some market analysis, with sales representative and management responsibilities. The petitioner identified 70 per cent of the beneficiary's time being spent in sales representation, marketing, and recruiting sales personnel and medical personnel for business purposes. On appeal, the petitioner appears to have added new duties in its response to the director's request for further evidence in the areas of training and public and professional outreach that were not contained in the original job description. When responding to a request for evidence, or on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. With regard to the new job duties, only the job duties described in the original petition and in response to the director's request for further evidence will be examined in this proceeding.

With regard to the proffered position's combined duties of market research analysis, sales representation and management responsibilities, only the position of market research analyst, which is not fully representative of the position, requires a baccalaureate degree in a specific specialty, at a minimum, for entry into the position. The 2004-2005 edition of the *Handbook* states that a master's degree is the minimum requirement for many private sector market and survey research jobs, and for advancement to more responsible positions. With regard to positions in sales, promotions, or marketing management, the *Handbook* states:

A wide range of educational backgrounds is 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. The *Handbook* further states that a bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

Thus, the *Handbook* does not establish that a baccalaureate degree in a specific specialty is required for entry into the proffered position. Without more persuasive evidence, the petitioner has not established that the proffered position in fact is a specialty occupation.

Regarding parallel positions in the petitioner's industry, the petitioner submitted no further documentation regarding academic credentials required for other marketing research analysts in similar firms. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated in its response to the director's request for further evidence that the full-time position was new to the company. It also stated that it had employed Mr. [REDACTED] as a consultant from January 1999 to July 2000 on a part-time basis. According to the petitioner, Mr. [REDACTED] has a master's of science degree in biology. The petitioner provided no evidentiary documentation, such as a diploma, to support this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence, the petitioner has not established this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Furthermore, the record is devoid of any information on the volume, complexity, or staff structure of the petitioner's present business operations that would explain the market research duties outlined in the job description. In addition, the record is devoid of information on any relationship between general scientific studies in biology or zoology and the sales and distribution of the petitioner's current product lines. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.