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**U.S. Citizenship
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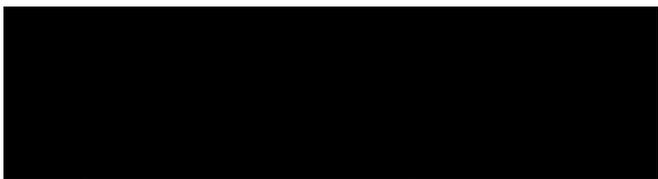
Date **JUL 12 2004**

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:



INSTRUCTIONS:

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.

Mari Johnson

to 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 full-service commercial recreational facility management company that provides service, staff, maintenance, swimming pool chemicals, and supplies to over 400 recreational facilities throughout Northern Virginia, Maryland, and the District of Columbia. It seeks to employ the beneficiary as a market research analyst. The petitioner 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 submits a brief.

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.

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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) 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. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 25, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: conducting research on business, market, and economic trends; collecting and analyzing data in order to develop business strategies and plans; developing reports and recommendations for business development and the streamlining of business procedures and organizational effectiveness; meeting with clients; and procuring, negotiating, and enforcing pool management contracts. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in marketing, economics, finance, or a related field.

The director found that the proffered position was not a specialty occupation because the job is not a market research analyst position; it is primarily a marketing manager, or a market research manager. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the proposed duties are not primarily the responsibilities of a market research analyst. 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).

On appeal, counsel submits various opinions and affidavits from industry experts in support of the claim that the proffered position is a specialty occupation. Counsel submits an organizational chart and states, in part, that the proffered position does not entail direct sales duties. Counsel further states that the degree requirement is common to the industry in parallel positions among similar organizations, and the proposed duties are so specialized and complex that a degree is required. Counsel additionally states that the petitioner normally requires a degree, and the petitioner has already hired one market research analyst who holds a master's degree in economics. Counsel also states that the AAO has approved market research analyst positions for a variety of industries and for industries similar to the petitioner's.

The record includes the following:

- Letter, dated January 31, 2003, from [REDACTED] of Educated Choices, LLC, who conclude: "[T]he position of Market Research Analyst is a specialty occupation highly similar to a Market and Survey Researcher, with aspects of Management Analyst, and that a baccalaureate degree in business, marketing, economics, finance, or a closely related field, is an industry standard and is a higher appropriate requirement for this position.";
- Petitioner's Payroll Tax Report for the period from January 4, 2002 – December 27, 2002, and roster of the petitioner's employees;
- Petitioner's Income Statement, dated September 2002, reflecting its net income as \$303,869.84;
- Various statistical charts reflecting data, such as the petitioner's annual gross revenue for the last five years;
- Letter, dated January 31, 2003, from [REDACTED] President of [REDACTED] and [REDACTED] who states, in part, that companies within the pool management and operations industry are utilizing the services of degreed professionals in positions similar to the proffered position;

- Letter, dated February 3, 2003, from [REDACTED] President of High Sierra Pool Management, in Arlington, Virginia, who provides position descriptions for its financial analyst and business analyst positions to show that they require the minimum of a bachelor's degree;
- Affidavit, signed on February 3, 2003, from the petitioner's director of human resources, who certifies, in part, that the proffered position requires a baccalaureate degree in marketing, finance, economics, or a related field, and that the petitioner has already hired one market research analyst with a master's degree; and
- Information from the petitioner's website, and various publications related to the petitioner's business.

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. The AAO does not concur with counsel that the proffered position is that of a market research analyst. Although counsel states on appeal that the proffered position does not entail direct sales duties, the petitioner's September 25, 2002 letter describes the beneficiary's duties, in part, as "assist[ing] in all aspects of business conducted with commercial pools in an assigned region, including meeting with clients, procurement and negotiation of pool management contracts, and enforcement of contract clauses." From this description, it appears that the direct sales duties are included in the proposed duties. The record, however, contains no explanation for this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). A review of the marketing manager and market research manager job descriptions in the *Handbook*, 2004-2005 edition, confirms the accuracy of the director's assessment to the effect that, the job duties parallel those responsibilities of a marketing manager or a market research manager. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a marketing manager or a market research manager job.

The opinion, dated January 31, 2003, from [REDACTED] of Educated Choices, LLC, is noted. They conclude: “[T]he position of Market Research Analyst is a specialty occupation highly similar to a Market and Survey Researcher, with aspects of Management Analyst, and that a baccalaureate degree in business, marketing, economics, finance, or a closely related field, is an industry standard and is a higher appropriate requirement for this position.” Here again, there is an inconsistency in the proposed duties that are described in the opinion from Educated Choices, LLC as compared to the description provided in the petitioner’s September 25, 2002 letter. In the Educated Choices, LLC opinion, the proposed duties are described, in part, as: “Assisting in the management of all aspects of business conducted in the region.” This description of duties, which indicates that the beneficiary will assist in a managerial capacity, is inconsistent with the proposed duties that described in the petitioner’s September 25, 2002 letter, which include, in part, “assist[ing] in all aspects of business conducted with commercial pools in an assigned region, including meeting with clients, procurement and negotiation of pool management contracts, and enforcement of contract clauses.” Again, doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho, supra*. In view of the foregoing, the letter from Educated Choices, LLC is accorded little weight.

Regarding parallel positions in the petitioner’s industry, the petitioner submitted two letters from individuals employed in the swimming pool management and operations industry. Although both writers assert that positions such as the proffered position require a baccalaureate degree in a related field, they do not provide evidence to support their assertions. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, although one of the writers provides position descriptions for financial analyst and business analyst positions, he does not provide a position description for a market research analyst position. In addition, the position description for the financial analyst position does not indicate that a bachelor’s degree in specific specialty is required.

The petitioner also cites various unpublished CIS decisions in support of the appeal. While 8 C.F.R. § 103.3(c) provides that Immigration and Naturalization Service, now CIS, precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the petitioner’s commentary regarding these decisions does not sufficiently illustrate that they are similar to the proffered position.

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. On appeal, counsel states that the petitioner has already hired one market research analyst who holds a master’s degree in economics. The record contains evidence detailing this employee’s first biweekly pay. The record, however, does not include evidence of her educational background. Furthermore, CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner’s past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical

application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ In this regard, the petitioner fails to establish that the position it is offering to the beneficiary entails the theoretical and practical application of a body of highly specialized knowledge.

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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.