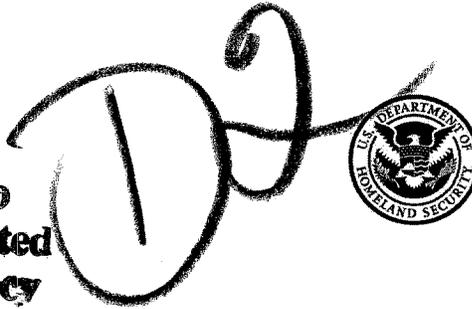


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**U.S. Citizenship
and Immigration
Services**



FILE: EAC 02 240 54604 Office: VERMONT SERVICE CENTER Date: **MAR 15 2004**

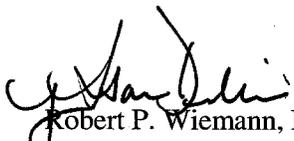
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:



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 imports and sells garments to department stores, discount stores and wholesalers. It seeks to employ the beneficiary as a marketing analyst. 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 submits a brief with additional documentation.

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.

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 October 10, 2002 letter that responds 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 part-time marketing analyst. Evidence of the beneficiary's duties includes: the cover letter submitted by the petitioner with the I-129 petition; the director's request for further evidence; and the petitioner's July 11, 2002 letter in response to the director's

request for further evidence. According to the initial petition, the beneficiary would perform duties that entail: assisting the marketing manager by creating promotional plans and setting prices for new and existing products using market research data from Information Research Inc. and AC Nielsen Market Research reports; analyzing current market trends to forecast product demand; generating reports to assist salesmen with product materials and sales brochures; and expanding the customer base through the continual planning and development of the petitioner's website. The beneficiary's website duties would involve evaluating ISP providers, data warehouse providers, payment collection software, and updating website updates with proper products for each seasonal cycle. An additional duty was described as preparing recommendations for the future direction of departmental activities. In the petitioner's response to the director's request for further evidence, the petitioner broke down the duties of the beneficiary into three generic phases of market research and analysis. The petitioner then indicated that the beneficiary would spend 30 percent of his time in the research and retrieval duties, 50 per cent in the analysis of research materials, 10 per cent producing reports; and 10 per cent doing ancillary duties such as researching fashion trends, and creating plans to assist salespeople.

The petitioner further explained it had previously relied on sales positions, including a sales director and a marketing director, to develop marketing strategies. However, the petitioner thought a sales person would not be able to undertake the duties of the position, which was based on the need for an intermediary between the sales staff and the marketing director. The petitioner stated that the current marketing director possesses a graduate degree in business administration, and provided a copy of the director's diploma.

The director found that the proffered position was not a specialty occupation and referred to the description of economist/market research analyst in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2000-2001 edition. Based on this document, the director noted that the position of marketing analyst is viewed as professional and required a graduate degree. The director then described the petitioner as a small company and further stated that it did not appear that the nature of the petitioner's business was such that it required the services of a professional marketing 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 states that the proffered position is a specialty occupation, although it is a more junior position to that of the current marketing director. Counsel also disputes the director's determination that the petitioner, based on its size, did not appear to require the services of a professional marketing analyst. Counsel asserts that nowhere in the *Handbook* is it indicated that marketing analysts are exclusively employed by only certain types of businesses. In addition, counsel submits two additional letters for the record. The first letter is from Dr. [REDACTED], Assistant Professor of Business Administration, Mercy College. The second letter is from Dr. [REDACTED], Center Director and Associate Professor of Marketing, Saint Louis University. Counsel also submits a sample of the petitioner's website. Counsel finally states that the petitioner has not previously employed anyone in the marketing analyst position.

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. Although the petitioner referred to the *Handbook* classification of advertising, marketing and public relations managers, the proffered position does not have any managerial aspects. For purposes of this proceeding, the proffered position will be examined using the *Handbook* classification of market research analyst. With regard to market research analysts, the 2000-2003 edition of the *Handbook* states on page 240 that graduate education is required for many private sector economist and market and survey research jobs. The *Handbook* also states that individuals with bachelor's degrees in marketing usually qualify for most entry-level positions as a research assistant, administrative or management trainee, marketing interviewer, or any of a number of professional sales jobs. Nevertheless, the AAO considers that the position of research analyst involves more responsible research duties and primarily requires a master's degree in marketing for entry into the position.

According to the documentation provided by the petitioner, the beneficiary would be the part-time assistant of the marketing director, and serve as an intermediary between the sales force and the marketing director. Other job duties involve updating the petitioner's website, and updating brochures. The critical element in examining whether the proffered position is a specialty occupation 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Although the beneficiary possesses a bachelor's degree in business administration with major studies in marketing, it is not clear from the duties of the position outlined by the petitioner that the proffered position would require the theoretical and practical knowledge of a body of highly specialized knowledge, and the attainment of a bachelor's degree in marketing for the position. Without more persuasive evidence, the petitioner has not established that the proffered position, in fact, is a marketing research analyst.

Regarding parallel positions in the petitioner's industry, the petitioner submitted thirteen job advertisements for marketing positions in a variety of businesses. These job advertisements are not viewed as marketing analyst positions at similar firms: the petitioner provided no further documentation or information as to the business volume, staffing structure, or business operations of the respective companies. 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).

The petitioner also submitted letters from officers of the Instock Corporation, New York, New York, and the Rocam, Inc. company in Temple City, California. Both letter writers stated that their companies required a minimum of a bachelor's degree in marketing for marketing analyst positions. While counsel asserted that the Instock Corporation was a company of comparable size, distinction and function to the petitioner, counsel provided no further documentation to substantiate this assertion. Neither letter writer provided any further documentation on the academic credentials of individuals on their staff who were hired as market analysts. Again, 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, id.*

Finally, the petitioner submitted letters from three academics from the fields of marketing and business. While the letter from Dr. [REDACTED] of Temple University clearly establishes the necessary coursework for an undergraduate degree in marketing, without more substantive documentation, his opinion does not establish that the industry standard for the proffered position is a baccalaureate degree in a specific specialty. The letters from Dr. [REDACTED] and Dr. [REDACTED] also do not establish this fact. Although both Dr. [REDACTED] and Dr. [REDACTED] assert that companies, regardless of size or function, require candidates for marketing analyst positions to possess marketing skills obtained through baccalaureate studies, they provide no further documentation to substantiate this assertion. 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, in its response to the director’s request for further evidence, stated that it had not previously hired another employee in a position similar to the proffered position. Therefore the petitioner cannot establish 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 beneficiary’s marketing duties as outlined by the petitioner 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. In addition, without more persuasive testimony with regard to the current marketing strategies or volume of e-commerce or traditional business activities, it is not possible to determine the specialization or complexity of the duties of the proffered position. 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.