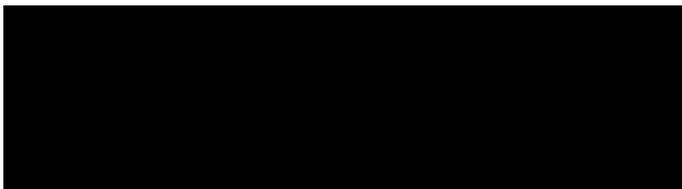




U.S. Citizenship
and Immigration
Services

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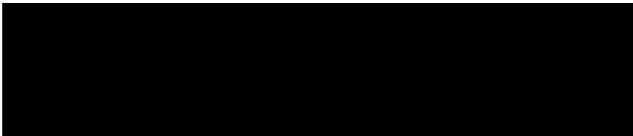


FILE: WAC 03 193 50410 Office: CALIFORNIA SERVICE CENTER Date: OCT 25 2004

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:



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.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to
prevent disclosure of information
pertaining to the security of the United States

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DISCUSSION: The service center 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 startup mortgage service company organized in 1999. The company seeks to hire the beneficiary as an “Asian marketing analyst,” and 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 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 director denied the petition, concluding the petitioner was not offering a bona fide position in a specialty occupation. He reasoned that marketing research analysts typically work for larger companies, such as banks. In response to the Request for Evidence (RFE) to document whether employing full-time market research analysts is a parallel practice in the industry, the petitioner replied, “Because of the highly competitive nature of this business, the details of the hiring and employment practices of our competitors are not easily discoverable.”

For the first time on appeal, the petitioner has provided numerous job ads of mortgage and real estate firms seeking to hire market research analysts, none of which are similar to petitioner in company size or age. The Citizenship and Immigration Services (CIS) regulations require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). The purpose of an RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). The petitioner had a reasonable opportunity to provide the requested evidence for the record before the visa petition was adjudicated, which the petitioner failed to do. The evidence being untimely, the Administrative Appeals Office will not now consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

The petitioner proposed that the beneficiary provide marketing analysis in the Asian and Asian-American market for real estate investments and mortgage services. The evidence of the beneficiary’s proposed duties is contained on the Form I-129, the attachments accompanying the Form I-129, the company support letter, and the petitioner’s response to the director’s request for evidence. According to this evidence, the beneficiary would research market conditions in the San Francisco Bay region and in Asiatic countries; develop and design methods for gathering data, including from competitors; forecast marketing trends; and analyze prices, sales and marketing methods in the United States and in Asia. The petitioner stated that a qualified candidate would also have a bachelor’s degree or the equivalent.

In his appeal brief counsel states that CIS has “erroneously characterized [the petitioner] as simply a mortgage service company when in fact [the petitioner] is more of a Mortgage Banking and Real Estate Investment and Development company [sic].” The director found that a mortgage service company would not “typically require the service [sic] of a full-time individual who performs only market research analyst duties.”

The petitioner described itself in its petition documents as a mortgage service company and changes that description for the first time on appeal to include mortgage banking and real estate investment and development. The petitioner submits an undated 2003 business expansion plan that includes the plan to acquire real estate investments, and photographs of properties partially owned by the petitioner, with no indication of the dates of purchase of such properties. A petitioner may not make material changes to a petition in an effort to make up for the petition's deficiencies in order to conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

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.

Upon review of the record, it is determined that 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), which require 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 applying these criteria to the record include: whether the Department of Labor's *Occupational Outlook Handbook* (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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Regarding parallel positions in the petitioner's industry, the only evidence submitted, albeit too late for the AAO to take into consideration, were the job ads of 20 companies with nothing to suggest any of the companies were parallel in size or history to the petitioner. Thus, the advertisements have little relevance as to whether the petitioner meets either of the first two criteria.

The director stated that the *Handbook* reveals that the duties are those of a market research analyst as listed in the *Handbook*. The position of market research analyst would generally require a degree in a specific specialty as a minimum requirement for entry into the occupation. The director further found, however, that the position was not that of a market research analyst. According to the *Handbook*, a market research analyst would not normally be found in a mortgage services company but is more typically employed by economic and marketing research firms, management-consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

The cursory descriptions found in the original petition and in the response to the Request for Evidence do not provide enough information about the day-to-day, specific duties of the proffered position to conclude that the position is for a market research analyst. In its August 19, 2003 response to the Request for Evidence, the petitioner states it is not possible to go into much detail about the duties of the job the beneficiary will perform: "This is a new job position; therefore it is not clear how much time will exclusively be spent on specific duties. It will depend on the projects and problems he encounters, and how our Asian client base develops. It is also unclear at this point how many future employees will be supervised by the beneficiary, as this also depends on the development of the business." Thus, the record lacks detail and provides no context as to the beneficiary's role within the petitioner's organization. From the record it appears that the petitioner is only a fledgling company with no salaried staff members. In responding to the Request for Evidence, the petitioner said it has eight workers, four of them on commissions and four as contractors. The four contractors were not paid at all for services in 2002 as they did not receive Internal Revenue Service Forms 1099-MISC.

It appears from the *Handbook* that the job offered is for a marketing manager or sales manager, who identifies potential markets, develops the firm's marketing strategy, and coordinates the market research strategy, sales and product development within the firm. The *Handbook* indicates that a broad range of educational backgrounds is suitable for entry in marketing manager positions. Thus, the petitioner has failed to establish the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In addition, the petitioner has not established an industry standard for employing marketing research analysts through the submitted job postings. There is no evidence on record that the companies advertising the openings are similar in nature or size to that of the petitioner, or that the openings are for positions parallel to the instant 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).

As to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), and whether the employer normally requires a degree or its equivalent for the position, the record does not indicate that the petitioner previously hired anyone for the proffered position, and thus it has not met the third criterion.

As to the criterion set forth in 8 C.F.R. § 214.2(h)(iii)(A)(4) – requiring the nature of the specific duties to be so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree -- such a finding would be meaningless in light of the AAO's determination that the petition does not seek a marketing research analyst. It is clear from the *Handbook* that the duties of such an analyst would be sufficiently specialized and complex but the petitioner's proffered position contained generalized duties that would more reasonably be performed by a marketing manager in the routine discharge of his or her duties. 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).

Upon review of the record, the petitioner has not presented any evidence to meet any of the four regulatory criteria found in 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. Accordingly, the AAO shall not disturb the director's denial of the petition.

ORDER: The appeal is dismissed. The petition is denied.