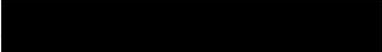
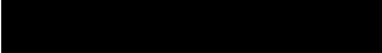




U.S. Citizenship  
and Immigration  
Services

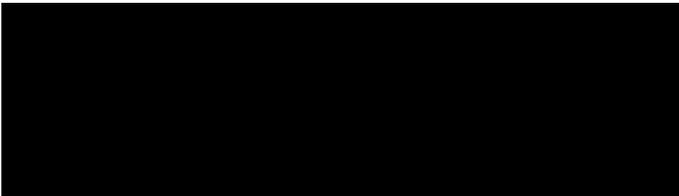


FILE: WAC 03 017 53122 Office: CALIFORNIA SERVICE CENTER Date: **OCT 25 2004**

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

Identifying data deleted to  
prevent disclosure of unclassified  
information and to prevent  
invasion of personal privacy

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**DISCUSSION:** The director of 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 medical office specializing in orthopedic surgery and rehabilitation. 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of the proffered position. On appeal, counsel submits a brief, and previously submitted and additional evidence.

The AAO will first discuss the director's determination that the proffered position is not 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.

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 marketing analyst. Evidence of the beneficiary’s duties includes: 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 perform duties that entail developing and implementing marketing strategies and plans; reviewing materials to meet current market conditions; maintaining regular contact with referral sources; developing and implementing events and functions to attract prospective customers; providing trend reports; monitoring marketing trends and competition; developing and preparing press releases, advertisements, brochures, flyers, and other materials; training and coordinating staff to respond to customer inquiries. The petitioner stated that a candidate for the proffered position must possess a bachelor’s degree or the equivalent in business, marketing, or commerce.

The director determined that the proffered position was not a specialty occupation. The director stated that the Department of Labor’s (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the duties of the proffered position are performed by advertising, marketing, promotions, public relations, and sales managers, occupations that do not normally require a specific baccalaureate degree. The director also found that the beneficiary was not qualified to perform the proffered position because he merely holds a bachelor’s degree in business administration with a major in management.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel contends that the duties of the proffered position are performed by a market analyst, not by a manager. Counsel narrates the duties of the proffered position, stating that the beneficiary will examine and analyze statistical data to forecast future marketing trends, gather data on competitors and establish research methodology and designs for data gathering. Counsel refers to the *Occupational Information Network (O\*Net)* to state that the duties of the proffered position are performed by a market research analyst. Counsel states that the *Handbook* relays that market and survey researchers may earn degrees in economics, business administration, marketing, statistics, or a related field. Counsel states that the director claims that the beneficiary completed only two entry-level marketing courses; however, counsel stresses that the *O\*Net* mentions that other skills are required to perform market research analyst duties such as mathematics, writing and comprehension, critical thinking, and complex problem solving. Counsel mentions that the beneficiary is qualified for the proffered position: his bachelor’s degree is equivalent to a U.S. baccalaureate degree in business administration.

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 first considers 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Counsel asserts that the proffered position is a specialty occupation based on information in the *O\*Net*. The DOL has replaced the *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991) with the *O\*Net*. Both the *DOT* and *O\*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *O\*Net*.

The *Handbook* reveals that the beneficiary's duties are not performed by a marketing analyst; the duties are encompassed by those performed by promotions, marketing, and sales managers. The *Handbook* explains that marketing managers develop a firm's detailed marketing strategy. With the help of subordinates, marketing managers determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets such as business firms, wholesalers, retailers, or the general public. The *Handbook* further states that marketing managers develop a 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. In collaboration with others, marketing managers monitor trends that indicate the need for new products and services and oversee product development. Sales managers direct the firm's sales program, analyze sales statistics gathered by their staff to determine sales potential, and monitor the preferences of customers. Promotions managers direct promotion programs that combine advertising with purchase incentives to increase sales. They develop promotion programs such as direct mail, telemarketing, television or radio advertising, inserts in newspapers, and Internet advertisements or Web sites.

The *Handbook* reports that employers find a wide range of educational backgrounds suitable for entry into promotions, marketing manager and sales positions. Under the *Handbook*, for example, an employer may find

that a person with experience in a related occupation and an associate or bachelor's degree in any field of study suitable for a sales, promotion, or marketing manager job. Specifically, for marketing, sales, and promotion manager positions the *Handbook* provides that some employers prefer, but do not require, a bachelor's or master's degree in business administration with an emphasis in marketing; most employers do not normally require a bachelor's degree in a specialized field. Thus, according to the *Handbook*, the offered position would not qualify as a specialty occupation because a bachelor's degree in a specific specialty is not required for entry into the proffered position.

Some of the beneficiary's duties appear to be performed by a market research analyst. The petitioner's September 27, 2002 letter claims that the beneficiary will examine and analyze statistical data to forecast future marketing trends, gather data on competitors, and establish research methodology and designs for data gathering; however, the petitioner never indicated the percentage of time the beneficiary will spend on these activities. Nor does the petitioner state the beneficiary will train interviewers to conduct surveys.

According to the *Handbook*, a market research analyst would not normally be found in a medical office specializing in orthopedic surgery and rehabilitation. The *Handbook* relays that in the private sector a market research analyst is employed by economic and marketing research firms, management consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

There is no evidence in the record that would establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the duties of the proffered position are performed by marketing and sales managers, jobs that do not require a bachelor's degree in a specific specialty.

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 on this ground.

The AAO will next discuss the director's conclusion that the beneficiary is not qualified to perform the duties of the proffered position.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation

requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, experience, and training were not equivalent to a baccalaureate degree in a specialty required by the occupation. On appeal, counsel states that the beneficiary is qualified for the position.

Upon review of the record, the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position.

The *Handbook* reveals that a bachelor's degree in a specific specialty is not required to perform the duties of a sales and marketing manager. The beneficiary holds a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in business administration with a major in management. Consequently, the petitioner establishes that the beneficiary is qualified to perform the duties of the proffered position. However, as previously discussed, 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 on this ground.

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.