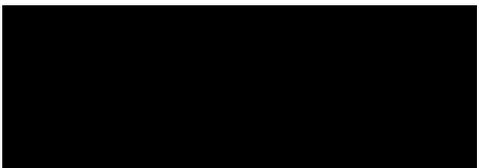




U.S. Citizenship
and Immigration
Services

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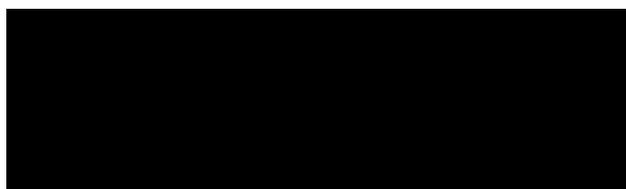


FILE: EAC 02 265 53124 Office: VERMONT SERVICE CENTER Date:

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

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protect identity~~

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 relocation service that 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 states that the proffered position qualifies as a specialty occupation and submits additional and previously submitted evidence.

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, in part: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary's duties would entail performing market analysis for a global marketing pipeline; establishing strategic alliances with companies and organizations; researching market trends; gathering statistical data on customer preferences and behavior; monitoring demand through direct marketing research activities and preparing reports and illustrations of findings; analyzing existing and potential markets and services taking into consideration consumer behavior, pricing, and the quality of service; establishing research methodology and a design format for data gathering such as surveys, opinion polls, or questionnaires; performing comparative analyses; researching, identifying, and defining market opportunities through alliances with other companies; creating and implementing global marketing strategies; recording, charting, comparing, and analyzing marketing and promotion results; and improving marketing strategies through competitive pricing, promotions, and other incentives to promote sales. The petitioner's January 10, 2003 letter stated that a candidate for the proffered position must possess a bachelor's degree in marketing.

The director found that the petitioner failed to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Dictionary of Occupational Titles* (the *DOT*), the director stated that the SVP of a market research analyst did not establish that the proffered position required a baccalaureate degree in a related field. The director mentioned that the submitted evidence did not establish that the petitioner's business actually required a marketing research analyst; that the petitioner had employed a marketing research analyst in the past; or that comparable moving companies have similar positions. The director noted that the petitioner did not submit a job advertisement or postings. According to the director, the beneficiary would not be employed full-time, performing the tasks associated with marketing positions in much larger companies. The director stated that companies like the petitioning entity generally do not employ full-time marketing analysts possessing marketing degrees; such services, the director stated, are usually provided by marketing companies on a contractual basis. The director stated that not all marketing positions require a baccalaureate degree, and that the record did not establish that a company of the petitioner's size would employ the beneficiary on a full-time basis to perform marketing research. Finally, the director stated that in response to his request for job postings and a vocational evaluation, the petitioner submitted letters from moving companies. The director found the submitted letters persuasive, yet deficient because the authors of the letters did not claim to employ a marketing analyst.

On appeal, counsel claims that the proffered position is a specialty occupation, satisfying all of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that the director's decision is inconsistent with the law and is contrary to the weight of the evidence. Counsel claims that the petitioner's degree requirement is the industry standard for similar companies and positions. Counsel points out that the beneficiary will perform the proffered position on a part-time basis, and that the director's claim that the position was full-time had a

significant impact on his decision to deny the petition. Counsel contends that not only Fortune 500 companies need marketing services. According to counsel, the petitioner submitted a copy of the former market research analyst's degree, which confirmed that someone with a degree had occupied the proffered position; counsel avers that the director overlooked this evidence. Counsel contends that the petitioner normally requires a degree or its equivalent with a specialization in marketing for the proffered position. Counsel states that the petitioner had submitted evidence that comparable moving companies employ market research analysts, and that the director did not give this evidence sufficient weight. Counsel delineates the proffered position's duties, and contends that the DOL's *Occupational Outlook Handbook* (the *Handbook*) and the *DOT* portray the proffered position as a specialty occupation. Counsel states that the proffered position's duties are of a specialized nature, typical of the responsibilities associated with a market research analyst. Citing prior AAO decisions, counsel contends that the AAO previously determined that a market analyst position was a specialty occupation. Counsel cites *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), stating that the court in the case held that the size of a petitioner, the tendered salary, and the absence of a past hiring practice are not relevant in determining whether a position qualifies as a specialty occupation. Counsel contends that the director never requested a job posting for the position; that the lack of a job posting was influential in the director's decision to deny the petition; and that a posting is irrelevant to the petition's merits. Counsel states that the director never requested a vocational evaluation and that this evaluation is not a standard requirement. Counsel submits job postings on appeal.

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.

In the denial letter, the director stated that the petitioner did not submit a copy of the offered position's job advertisement and/or additional job postings, and that in response to his request for job postings and a vocational evaluation, the petitioner submitted letters from moving companies. Although the director did not explicitly request these items in the request for evidence, the request for evidence sought any evidence that would show that in the petitioner's company or industry a baccalaureate degree in a specific field of study was a standard minimum requirement for the proffered position. Thus, the request for evidence was reasonably designed to elicit evidence that would establish a specific baccalaureate degree requirement for the proffered position, and the submitted evidence may take the form of job advertisements from other companies.

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)).

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the *DOT*. However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The DOL has replaced the *DOT* with the *Occupational Information Network (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 that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the DOL has assigned it a specific SVP rating in the *DOT*.

In determining whether a position qualifies as a specialty occupation under the first criterion, 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. Contrary to the director's statement, that a company of the petitioner's size would not employ the beneficiary on a full-time basis to perform marketing research duties, CIS does not rely on the size of the petitioner to determine whether a position qualifies as a specialty occupation. Nor does it rely on the absence of a prior record of hiring members of the professions in a case involving a newly created position or on the amount of the proffered salary. Contrary to the director's statement, that the proffered position was full-time, the Form I-129 petition indicated that the proffered position was part-time. However, whether the beneficiary is part-time or full-time would not change the beneficiary's actual job duties.

In the August 12, 2002 and January 10, 2003 letters, the petitioner described the duties of the proffered position. However, in the appeal brief counsel seeks to enhance the duties of the job. For example, counsel states that the beneficiary will train survey/promotional personnel; contact and interview a sample population composed of relocation services consumers who are likely derived from secondary statistical data publishers and Internet traffic surveys; and interview customers, sales people, and industry insiders. Such statements of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Therefore, the AAO will disregard these statements.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* reveals that a marketing analyst job is a specialty occupation; however, the proffered position's duties are more aligned with the duties of a marketing manager. The *Handbook* reports that one key responsibility of a marketing analyst is to devise methods and procedures for obtaining data; for instance, designing telephone, mail, or Internet surveys to assess consumer preferences, and having trained interviewers under the marketing analyst's direction. The petitioner stated that the beneficiary would establish research methodology and design a format for data gathering. But it never elaborated on the duty with any specificity or indicated the percentage of time devoted to the duty.

A marketing manager's responsibilities parallel those of the proffered position. Similar to the beneficiary who will create and implement the company's "marketing strategy," research "market trends," gather data about "customer preferences and behavior," "monitor demand," analyze markets and take into account "consumer behavior, pricing, as well as quality of service," "identify and define market opportunities," and "conduct comparative analysis of [the petitioner] against other competitors," marketing managers are concerned with developing a firm's detailed marketing strategy. Marketing managers determine the demand for products and services offered by the firm and its competitors; identify potential markets such as business firms or the general public; 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; monitor trends that indicate the need for new services; and oversee product development.

The *Handbook* reports that employers find a wide range of educational backgrounds suitable for entry into marketing manager 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 is suitable for a marketing manager position. Specifically, for marketing manager positions the *Handbook* provides that some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing, though most employers do not normally require a bachelor's degree in a specialized field. Consequently, the *Handbook* reveals that the offered position would not qualify as a specialty occupation because only some employers require a bachelor's degree in a specific specialty.

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - the record contains letters from three businesses and job postings. The letters and postings are not sufficient in establishing the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The letters from [REDACTED] all stated that the industry customarily requires a candidate for a market research analyst job to possess at least a bachelor's degree in marketing or a related field. Two of the letters specifically claimed that companies with gross revenues exceeding one million dollars and with nationwide operations would typically require a candidate to possess at least a bachelor's degree in marketing or a related field. None of the authors of the letters, however, submitted independent evidence that would corroborate their statements. 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). Consequently, the evidentiary weight of the uncorroborated statements is diminished. The AAO observes that, as mentioned in the director's denial letter, none of the authors indicated whether their company employed a market research analyst possessing a baccalaureate degree in marketing.

All of the postings seek candidates with bachelor's degrees in marketing or other related fields. But none of the postings are from businesses similar in nature to the petitioner, a relocation service. [REDACTED] is in the healthcare industry; The Metron Corporation is a consumer products company; American Greetings supplies greeting cards; Countrywide Financial Corporation provides banking and financial services; United Staffing Systems sought a market research assistant for a law firm; CBS Television is in the media industry;

and Reeve Associates is a consumer package company. Consequently, the letters and postings fail to establish that a bachelor's degree requirement is common to the industry in parallel positions among similar organizations.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The director failed to acknowledge the petitioner's claim that it had previously employed a person as a market research analyst. Nonetheless, this lack of acknowledgement does not establish that the petitioner normally requires a degree or its equivalent for the proffered position since the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *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 To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As previously stated, the beneficiary's duties resemble those performed by marketing managers, a position that the *Handbook* reports would not require a bachelor's degree in a specific specialty. Consequently, the petitioner fails to satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that it normally requires a degree or its equivalent for the proffered position.

Counsel's claim that the employer previously employed someone who possessed a baccalaureate degree in business administration as a market research analyst does not satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). In fact, it undermines the petitioner's claim that it normally requires a degree or its equivalent in a specific specialty; namely marketing, for the proffered 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. As already discussed, the beneficiary's duties resemble those performed by marketing managers, positions that do not require a bachelor's degree in a specific specialty. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.