

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **APR 05 2005**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:
[REDACTED]

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: In October 1997, the service center director denied the nonimmigrant visa petition and, in December 1998, the Administrative Appeals Office (AAO) dismissed the subsequent appeal. In February 2004, on the petitioner's motion to reopen or reconsider, the AAO withdrew the decisions of the AAO and the director and remanded the matter for further action and the entry of a new decision. After the director's entry of a decision adverse to the petitioner on the specialty occupation issue on November 16, 2004, the matter is again before the AAO on appeal.¹ The appeal will be dismissed. The petition will be denied.

The petitioner is a corporation engaged in limousine transportation services. In order to employ the beneficiary as a Japanese market research analyst ("Japanese Market Research Analyst, Level I"), 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, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director's 1997 decision determined that the petitioner proffered a specialty occupation position - market research analyst - but that the beneficiary's bachelor's degree in American studies did not qualify her to serve in the pertinent specialty occupation. In its 1998 decision dismissing the appeal, the AAO concurred with the director that the petitioner had not established that the beneficiary was qualified to serve in the proffered specialty occupation position of market research analyst, which, the AAO determined, requires a master's degree in economics or marketing. In its February 2004 decision, the AAO determined that the beneficiary was qualified to serve in the proffered position, but that the position appeared to be that of a marketing manager and, therefore, not a specialty occupation. The AAO also remanded the proceeding for a new decision as to whether the proffered position is a specialty occupation. In the November 16, 2004 decision presently before the AAO, the director denied the petition on the basis that the petitioner had not established that the proffered position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director determined that the proffered position more closely comports with a marketing manager than a market research analyst.

On appeal, counsel contends that the duties of the proffered position require the services of a market research analyst operating at a specialty occupation level.

Counsel's brief (at pages 7 and 8) reiterates the proposed duties as first stated in the petitioner's letter of support filed with the Form I-129 in 1997:

1. Research and analyze trends and changes in the market for transportation services among Japanese and international corporations as well as related markets. This research should include pricing structures and client preparations.
2. Reports findings to company president.
3. Communicates with Japanese clients by phone, fax, e-mail and in person to determine client needs and preferences.
4. Research companies which can offer value-added services to our current clients and potential business prospects, gathering information on services, price schedules, and

¹ The service center director processed his decision in normal fashion, although the AAO's February 11, 2004 decision directed him to certify his decision to the AAO if adverse to the petitioner. The petitioner took advantage of the same opportunity to submit a brief and additional evidence as would have been available on certification.

- other information as needed. This is part of our expansion into internet sales and services.
5. Design service packages based on analysis of customer needs and preferences and available services.
 6. Determine potential sales and forecast trends in both Japanese and American market based on internet and company research. This is especially necessary for our internet sales and services projects.
 7. Report findings and prospects to [the] company president, doing follow-up research as needed.
 8. Analyze staffing alternatives for internet sales and research projects, and propose job structures to company president.
 9. Respond or suggest responses to contingencies, complaints, and inquiries, basing responses on research results. This duty crosses over between the transportation services and sales and services projects.
 10. Review and adapt all corporate Japanese language communications, including sales and marketing, and conflict resolution protocols for appropriateness, considering market niche and cultural factors. This crosses over between both aspects of our business, and is an extremely sensitive aspect of the position.
 11. Translate and adapt marketing documents to the relevant Japanese market sector, and prepare specialized marketing documents as needed. This is especially necessary for our internet sales and services project. It requires knowledge of Japanese corporate preferences and customs.
 12. Deal with representatives of clients, to identify their present and future needs, in order to understand market evolution and guide business development.
 13. Research local markets to help design tours that meet our clients' needs for insight into U.S. industries, especially the consumer retail and computer sectors. This focuses on our transportation services business, but allows research into value-added services we can offer to these high-return-on-investment clients.

The evidence of record does not satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

Counsel has effectively rebutted the director's finding to the effect that a market research analyst position is incompatible with a business of the type and size of the petitioner. However, the petitioner has not established that the person in the proffered position would actually perform the services of a market research analyst.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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.

The AAO recognizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of a wide variety of occupations. The AAO does not agree with counsel's assertion (brief, at page 8) that the above listed duties are "substantially similar" to those of a market research analyst as described in the 2004-2005 edition of the *Handbook*.

The *Handbook*, at page 173, describes the employment of market research analysts as follows:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need

After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations

Because of the applicability of market research to many industries, market research analysts are employed in most industries

As a whole, the *Handbook's* information on market research analysts conveys that their work is characterized by the design and implementation of data-collection methodologies, data collection, and precise data analysis. This emphasis is reflected in the following tasks that the DOL's *Occupational Information Network (O*NET)* lists for market research analysts:²

- Collect and analyze data on customer demographics, preferences, needs, and buying habits to identify potential markets and factors affecting product demand.
- Conduct research on consumer opinions and marketing strategies, collaborating with marketing professionals, statisticians, pollsters, and other professionals.
- Develop and implement procedures for identifying advertising needs.

² References to the relevant *O*NET* sections appear just below the title of each section of the *Handbook*. The *O*NET* is not a persuasive source of information on whether a baccalaureate or higher degree in a specific specialty is a minimum for entry into an occupation. Unlike the *Handbook*, the *O*NET* does not specify the particular type of degree that a job would normally require.

- Devise and evaluate methods and procedures for collecting data (such as surveys, opinion polls, or questionnaires), or arrange to obtain existing data.
- Forecast and track marketing and sales trends, analyzing collected data.
- Gather data on competitors and analyze their prices, sales, and method of marketing and distribution.
- Measure and assess customer and employee satisfaction.
- Measure the effectiveness of marketing, advertising, and communications programs and strategies.
- Monitor industry statistics and follow trends in trade literature.
- Prepare reports of findings, illustrating data graphically and translating complex findings into written text.

To the extent that the proposed duties are described in the record, the beneficiary's involvement with marketing would be on a much less specialized and analytical level. Consonant with this fact are the statements at the declaration of the petitioner's president (Exhibit C of the 1997 appeal) that the petitioner "can out-source the data analysis" and that he "do[es] not have great faith in the ability of 'number-crunchers' to discover the aspects of our products which make the key difference in whether clients stick with us and purchase more services, or go to our competitors." The proposed duties appear to be a combination of marketing/public-relations specialist, marketing manager, sales, and translator duties that does not require a minimum of a bachelor's degree, or the equivalent, in a specific specialty. The duties do not align with an occupation for which the *Handbook* indicates a normal requirement for a degree in a specific specialty. The record presents no specific tasks that demonstrate that the beneficiary would be applying the skills, competencies, and knowledge of a market research analyst or any other position that requires at least a bachelor's degree or its equivalent in a specific specialty.

Counsel errs in stating that the AAO "has already affirmed that the Beneficiary's Bachelor's Degree in American Studies qualifies her for the proffered position of a Japanese Market Research Analyst" (brief, at page 8). In its latest decision, the AAO found that the beneficiary was qualified to serve as a marketing manager –not a market research analyst – and that marketing management did not require at least a bachelor's degree in a specific specialty.

Counsel's citation of previous AAO decisions opinions about positions other than that proffered here is not persuasive. Counsel has not established that the facts of the cited decisions are substantially the same as the facts in the instant case. Counsel's references to AAO non-precedent decisions have no persuasive impact. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding, see 8 C.F.R. § 103.2(b)(16)(ii), and the record presently before the AAO does not establish the proffered position as a specialty occupation.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As discussed above, the *Handbook* does not indicate that the proffered position is one for which there is an industry-wide requirement for at least a bachelor's degree in a specific specialty. No professional association has provided evidence. Also, the record does not include any submissions from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in a specific specialty.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), under which an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a at least a bachelor's degree in a specific specialty. The evidence of record does not establish such complexity or uniqueness.

The petitioner presented no evidence relevant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Counsel makes two requests that do not merit extensive discussion, namely, the requests to amend the petitioner's 1997 petition and to change the beneficiary's status. Changes of status, administrative rejections of petitions, and the acceptance of new petitions are outside the AAO's jurisdiction and purview. Furthermore, CIS regulations do not allow for amending an earlier petition by any means other than the filing of new petition at the appropriate field office, and that petition will be subject to the statutory caps in place at the time when the new petition is filed.

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 appeal will be dismissed.

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