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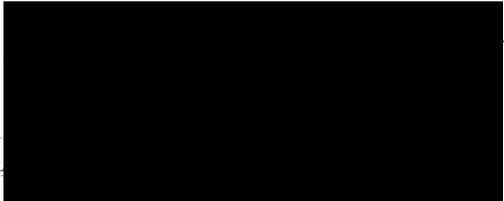


U.S. Citizenship  
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APR 05 2005



FILE: SRC 04 014 50695 Office: TEXAS 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:

SELF-REPRESENTED

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:** 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 sells gasoline additives. It seeks to employ the beneficiary as a market research 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; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief and previously submitted and additional evidence.

The AAO will first address whether the proffered position is 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 market research 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 gathering and analyzing information and preparing data for the marketing research department; supporting the sales team and strategic planning process; creating client and category specific presentations for the advertising sales department using secondary research sources; providing competitive intelligence; monitoring print and competitive advertising as well as specific industries for trends and opportunities that will support revenue growth; participating in selected primary research studies; acting as project manager for specific research initiatives; and having expertise on assigned categories and forecasting changes and trends for them. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in marketing or its equivalent through work experience.

The director determined that the submitted evidence failed to establish that the proffered position, as it related to the petitioner's organization and the industry, qualified as a specialty occupation. According to the director, the petitioner did not establish, through the job postings, that similar organizations require a bachelor's degree for the proposed position. Nor did the director find that the petitioner established that its particular position is so complex or unique that it can be performed only by a person with a degree. Furthermore, the director concluded that, based on the evidence in the record, the beneficiary's education, training, and experience was not equivalent to a baccalaureate or higher degree in marketing. Thus, the director found the beneficiary unqualified to perform a specialty occupation.

On appeal, the petitioner states that 75 percent of today's jobs require a bachelor's degree and at least five years of experience, and that it is not unique for the industry or our company to require a degree, since it shows a candidate's character, professionalism, and dedication. The petitioner states that regardless of a company's size and name, every company has complexities and endeavors for success. Referring to the submitted job postings, the petitioner states that they represent diverse industries requiring a bachelor's degree for positions similar to the petitioner's. According to the petitioner, the two credentials evaluations performed by different companies evince that the beneficiary possesses the equivalent to a bachelor's degree in marketing.

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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

The AAO notes conflicting evidence in the record: in the Form SS-4, Application for Employer Identification Number, the petitioner indicates that the principal activity of its business is "business consultant," even though the categories of "retail" and "wholesale" are shown in Form SS-4 as principal business activities. The "business consultant" designation conflicts with the Form I-129, which shows the petitioner as engaging in the "sale of gasoline additives."

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). No evidence in the record explains or reconciles this material incongruity.

The petitioner states that the proffered position is comparable to a market research analyst. The submitted document entitled "SalaryExpert's Premium Salary Report" states that "[o]ver 15,000 available job descriptions have been analyzed to match your job," and the closest job with available earnings information is "analyst market research." For various reasons, this documentary evidence is not persuasive. No description is provided by the petitioner of the job that is analyzed in the report; it may not be the same job in the instant petition. Nor does this document state that a specific baccalaureate degree is required for an "analyst market research." Furthermore, the salary report seems to contain information from the *Standard Occupational Classification System (SOC)* and the *Occupational Information Network (O\*Net)*. The DOL has replaced the *Dictionary of Occupational Titles (DOT)* with the *Occupational Information Network (O\*Net)*. Both the *DOT* and the *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 Department of Labor's *Occupational Outlook Handbook (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, information contained in the *O\*Net* and the *SOC* are not persuasive.

The *Handbook* reports that a key responsibility of a marketing analyst is to devise methods and procedures for obtaining data such as designing telephone, mail, or Internet surveys, to assess consumer preferences, and directing the trained interviewers engaged in the process. The petitioner states that the beneficiary would "participate in selected primary research studies" and "act as project manager for specific research initiatives." These duties are vague. No description is given of what the beneficiary will do to "participate" in the primary research studies. Nor is there a description of what acting as a project manager entails. Nor does the petitioner indicate the percentage of time devoted to these duties. Given the vagueness of these duties, the AAO therefore cannot determine whether they reflect those of a marketing analyst.

A marketing manager's responsibilities correspond with those of the proffered position. Similar to the beneficiary who will provide "support for the company's sales team"; use "secondary research sources"; provide "competitive intelligence"; monitor "print and competitive advertising" and "specific industry trends," a marketing manager, the *Handbook* states, determines the demand for products and services offered by the firm and its competitors; identifies potential markets such as business firms or the general public; develops 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; monitors trends that indicate the need for new services and oversees product development; and works with advertising and promotion managers to promote a firm's products and services.

The *Handbook* reports that, for marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing.

A "specialty occupation" is defined in the Act as an occupation that *requires* theoretical and practical application of a body of highly specialized knowledge, and the 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. The *Handbook* reports that some employers *prefer* a bachelor's degree in a specific specialty for a marketing manager. The terms "prefer" and "require," are not synonymous; they do not express a similar meaning. The *American Heritage Dictionary of the English Language* defines the term "prefer" as to select in preference to another or others; value more highly; like better, and "require" as to have use for as a necessity or need. Consequently, the petitioner fails to establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) because the proposed position is similar to a marketing manager, an occupation that does not *require* a specific bachelor's degree.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner relies on job postings and states that they represent diverse industries, which require a bachelor's degree for positions similar to the petitioner's. This evidence fails to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) since the regulation explicitly requires that the organizations be similar to the petitioner, which is described as either selling gasoline additives or serving as a business consultant. The employers differ from the petitioner. United Parcel Service (UPS) provides logistics and distribution; Office Depot furnishes office supplies; Management Recruiters International represents a utility  
[REDACTED] are manufacturers; and

Direct Energy and Pacificorp are utility companies. As such, the postings fail to establish that a specific 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. Again, the *Handbook* reveals that the proffered position is similar to a marketing manager, an occupation that does not require a specific bachelor's 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. As already discussed above, the *Handbook* reveals that the proffered position is similar to a marketing manager, an occupation that does not require a specific bachelor's degree. No evidence in the record demonstrates that the proffered position rises beyond this level.

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 proffered position is not a specialty occupation requiring a bachelor's degree in a specific specialty; thus, whether the beneficiary is qualified to perform its duties is inconsequential.

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.