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U.S. Citizenship  
and Immigration  
Services

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**DD**  
APR 05 2005

FILE: EAC 03 067 56134 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

**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 an advertising agency that seeks to employ the beneficiary as a marketing research manager. 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 petitioner has failed to establish that the position is a specialty occupation. On appeal, the petitioner submits a brief and additional 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 petitioner is seeking the beneficiary's services as a marketing research manager. Evidence of the beneficiary's duties includes: 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 would perform duties that entail directing and coordinating market research and development activities for the petitioner's clients' organizational products, services or ideologies; researching market conditions in the publishing and marketing industry to provide management insight into consumer behavior and trends that will

impact on market conditions of the corporations; analyzing data obtained through market research and preparing reports regarding marketing and promotional activities that in turn generates increased revenues; determining the demand for products and services offered by a firm and its competitors and identify potential customers; planning and formulating aspects of research and development proposals, such as objectives or purpose of project, applications that can be utilized from findings, cost of project and equipment and human resources requirements; reviewing and analyzing proposals submitted to determine if benefits derived and possible applications justify expenditures; approving and submitting proposals considered feasible to management for consideration and allocation of funds; developing and implementing methods and procedures for monitoring projects, such as preparation of records of expenditures and research findings, progress reports and staff conferences in order to inform management of current status of each project; developing pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied; overseeing development of marketing projects and product development, coordinate the marketing efforts by designing, directing and promoting all marketing campaigns; overseeing the development and monitoring trends that indicate the need for new services. The petitioner stated that a candidate must possess a bachelor's degree in business administration or economics with a major area of specialization in marketing.

The director requested additional evidence. The director requested a statement describing each project that the beneficiary will be involved in during the next year to include the specific marketing research management methodologies to be utilized by the beneficiary; the type, size and location of the population/industry targets to be studied, the final format in which research is to be presented and the ultimate recipient of the information. Additionally, the director requested a comprehensive business plan for the petitioner and to identify how each of the beneficiary's specific research projects will further enhance the petitioner's ability to reach its short-term and long-term business objectives. Also, the director requested additional evidence that would show that the actual duties of the position being offered to the beneficiary are so specialized and complex that the knowledge required to perform the duties would usually be associated with the attainment of a baccalaureate degree or higher. The director noted that the petitioner was relatively new and had few employees. The director requested evidence that the company had sufficient work and resources available so that the beneficiary would be performing services in a specialty occupation for the requested period of employment. Finally, the director noted that the beneficiary is subject to the two-year foreign residency requirement of Section 212(e) of the Act and requested evidence that the beneficiary had been granted a waiver.

In response to the director's request, counsel restated the beneficiary's duties and stated that the listed duties are similar to the description found under market research analyst in the *O\*Net*. Additionally, counsel explained that the petitioner is a fairly new corporation and has not employed any other individual for the position of market research manager. Counsel stated that the petitioner is a sole proprietorship and is not required to file corporate income tax returns. In response, counsel called the position a market research analyst and provided a copy of the petitioner's business plan to increase its sales, including a general discussion of the petitioner's marketing strategy. The marketing strategy included a general discussion of target markets, pricing strategy and promotion strategy. The business plan did not discuss the role of the marketing research manager within the company. The petitioner submitted a letter from a client stating that it has been doing business with the petitioner. Additionally, the petitioner submitted a fee receipt and a statement from the United States Department of State with instructions on how to apply for a "no objection" waiver from the foreign residency requirement.

In his decision, the director found that the job offered did not qualify as a specialty occupation. The director noted that the petitioner did not provide evidence concerning the petitioner and its need for a market research manager. The director stated that the petitioner did not provide information regarding the need for a market research manager focusing on the methodologies and objectives for the petitioner. The director questioned whether the position could be considered to be in the realm of specialty occupation if the position does not in fact exist as indicated in the Labor Condition Application. The director concluded that CIS is not persuaded the beneficiary will actually be employed in the capacity indicated, that is, to perform services of the "specialty occupation."

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 Department of Labor's *Occupational Outlook Handbook (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 routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

In the instant petition, the petitioner indicated that the duties of the proffered position are those of a marketing research manager. The petitioner stated that the beneficiary will be responsible for directing and coordinating market research and development activities for their clients' organizational products, services or ideologies; determining the demand for products and services offered by a firm and its competitors and identify potential customers. The petitioner stated that the beneficiary would develop pricing strategies with the goal of maximizing the firm's profits or share of the market while ensuring the firm's customers are satisfied.

Based on a review of the *Handbook* and the petitioner's job description, the AAO concludes that the duties of the proposed position parallel those of a marketing manager. According to the *Handbook*, marketing managers develop the 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. According to the *Handbook*, marketing managers develop 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 determining the training and education required for a marketing manager position, the *Handbook* states:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. 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.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the marketing manager position.

The petitioner did not address the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

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 specific degree or its equivalent for the position. The petitioner stated that this is its first marketing research manager 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. 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 in a specific specialty. In establishing a position as a specialty occupation, a petitioner must describe specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. On appeal, the petitioner states its business would benefit from a market research service and attached a description of surveys to be conducted that was previously provided in the response to the request for evidence. As discussed above, the petitioner's submitted business plan generally describes plans to increase its sales, including a general discussion of the petitioner's marketing strategy. The marketing strategy included a general discussion of target markets, pricing strategy and promotion strategy. The business plan did not discuss the role of the marketing research manager within the company. A description of the petitioner's strategy to expand its business cannot substitute for a description of the specific duties to be performed by the beneficiary. The *Handbook* portrays the duties of the proffered position as performed by a marketing manager, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

In the request for evidence, the director requested evidence that the petitioning firm is a viable concern, and has sufficient work at the H-1B level to employ the beneficiary. In response, the petitioner indicated that it is a sole proprietor and files no corporate income taxes. The petitioner submitted one letter from a client who had done business with the petitioner. The AAO notes that the petitioner indicated on its Form I-129 that it grosses in excess of \$250,000 and employs five people. The record contains no financial documentation to corroborate the petitioner's statements, whether income tax records of the sole proprietorship, employment records of employees, or in any other form. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The statute requires that a petitioner establish that a beneficiary will be coming to the United States temporarily to perform services in a specialty occupation. Section 101 (a)(15)(H)(i)(b) of the Act, 8 U.S.C. §

1101 (A)(15)(H)(i)(b); 8 C.F.R. § 214.2 (h)(1)(ii)(B)(1). The petitioner has failed to provide evidence that it will employ the beneficiary in a specialty occupation.

Additionally, the AAO notes that the director requested evidence that the beneficiary has received a waiver of the two-year foreign residency requirement, if she is subject to Section 212(e) of the Immigration and Nationality Act. As indicated above, the petitioner provided an instruction sheet from the United States Department of State on how to apply for such a waiver. The petitioner does not address this issue on appeal. While this issue is not before the AAO, if the beneficiary is subject to the foreign residency requirement and does not obtain a waiver, she will be ineligible to change her status to H-1B.

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.