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FILE: WAC 03 055 55144 Office: CALIFORNIA SERVICE CENTER

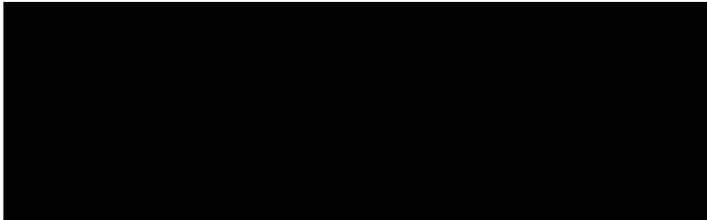
Date:

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

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 skilled nursing facility that 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 proposed position does not qualify as a specialty occupation. On appeal, the petitioner submits a brief.

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 petitioner's support letter; and the petitioner's response to the director's request for evidence. According to the petitioner December 2, 2002 letter the beneficiary would perform duties that entail organizing, developing, and implementing strategic planning; performing marketing strategies and analysis of the customer base; and setting up product offering and communication strategies assigned in the health care facilities. Counsel's August 13, 2003 letter elaborated on the duties. The petitioner stated that the position requires a bachelor's degree with a major in marketing, commerce, or economics.

The director stated that many of proposed duties appear to reflect those of a market research analyst as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). But the director stated that sole reliance on the *Handbook* and other government publications to demonstrate that a position is a specialty occupation is misplaced. Each position, the director stated, must be evaluated based on the nature and complexity of the job duties, and performing incidental specialty occupation duties is insufficient to establish that a position is a specialty occupation. The director also stated that the beneficiary's degree in a related area does not guarantee the position is a specialty occupation. The director stated that because the petitioner did not provide the requested organizational chart he could not determine whether the petitioner had the organizational complexity to validate a position for a market research analyst. According to the director, absent advertising, marketing, and/or sales staff, the beneficiary would perform these duties, which are not normally considered specialty occupation duties. The director relayed the *Handbook's* information about the industries that normally employ market research analysts, and stated that the petitioner and its industry are not the typical employer of a market research analyst. Citing to the decision in *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988), the director stated that the petitioner's failure to submit requested evidence which would substantiate information provided by the petitioner raised doubt about its validity as a business entity and its offer of employment.

On appeal, counsel asserts that the proposed position requires knowledge of principles and methods for showing, promoting, and selling company products or services, including marketing strategy and tactics, product demonstration, sales techniques, and sales control systems; identifying information by categorizing, estimating, recognizing differences or similarities, and detecting changes in circumstances or events, including analysis of information and evaluating results to choose the best solution; solving problems; communicating with others outside the organization; representing the petitioner to customers, the public, government, and other external sources. Counsel asserts that because the position is entry-level it does not require organizational complexity, and states that the *Handbook*, the *Dictionary of Occupational Titles (DOT)*, and the *Occupational Information Network (O*Net)* reveal that a bachelor's degree is sufficient for an entry-level market research analyst position. Counsel explains why a baccalaureate degree is sufficient for the proposed position. Counsel maintains that the AAO has already decided that a petitioner's size and scope are not dispositive in establishing the need for the services of a specialty occupation. The actual and legitimate need of services, counsel asserts, is important.

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 in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; a specific 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 in a specific specialty. 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.

Counsel asserts that the proffered position is a specialty occupation because of information in the *DOT* and *O*Net*. 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 *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 *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 *DOT* and *O*Net*.

Counsel asserts that the proposed position resembles a market research analyst. The *Handbook* indicates that a principal responsibility of a market research analyst, which is a specialty occupation, is to conduct primary research by devising methods and procedures for obtaining data. The *Handbook* explains that:

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. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or

setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

The evidence of record does not establish that the beneficiary will mainly conduct primary research. Counsel's August 13, 2003 letter describes the beneficiary as devoting only 10 percent of her time to devising methods and procedures to obtain data, such as telephone, personal, or mail interview surveys. The duty to "plan, design, analyze[,] and implement results of [a] study," which involves 10 percent of the beneficiary's time, is described in generic terms without any specificity; thus, it is not clear whether this duty would require baccalaureate-level knowledge in a specific specialty. The AAO's conclusion, from the evidence in the record, is that the proposed position does not rise to the level of a market research analyst as that occupation is described in the *Handbook*. Consequently, the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner establish that a specific degree requirement is common to the industry in parallel positions among similar organizations. The job postings are not persuasive in satisfying this requirement as they are from employers that are dissimilar in nature to the petitioner. The employers in the postings include a pharmacy, insurance companies, a consumer products company, an industrial and hazardous waste management company, and an education company. Thus, the job postings fail to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Based on the evidence, the proposed position does not rise to the level of a market research analyst as that occupation is portrayed in the *Handbook*. Furthermore, no evidence establishes that the proposed duties are so complex or unique as to require baccalaureate-level training in a specific specialty. Thus, the petitioner fails to establish second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Because the proposed position is newly created, no evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Earlier in this decision the AAO has conveyed why the proposed position does not rise to the level of market research analyst. Furthermore, no evidence establishes that the proposed duties so specialized and complex as to require knowledge that is usually associated with the attainment of a baccalaureate degree in a specific specialty. Accordingly, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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.