



U.S. Citizenship
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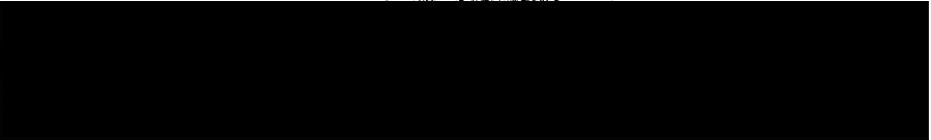
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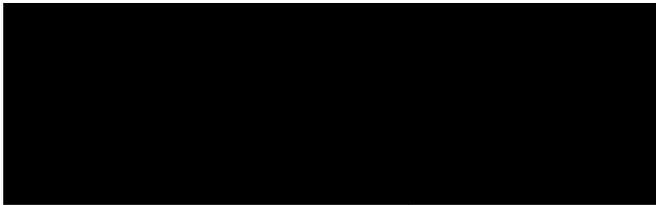
FILE: WAC 03 013 53416 Office: CALIFORNIA SERVICE CENTER Date: **DEC 02 2005**

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.

[Handwritten signature of 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 operates as a distributor and wholesaler of electronics and seeks to extend the nonimmigrant status of the beneficiary in a specialty occupation as a market research analyst. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

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 petitioner states that it is seeking the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; a September 25, 2002 letter of support from the petitioner; and the petitioner’s response to the director’s request for evidence, which included a more detailed description of the work done by the beneficiary.

At the time of filing, the petitioner stated that the beneficiary would continue to: devise methods to increase profitability, manage expenses and reduce department overhead; analyze statistics, and other types of data, such as annual revenues, and expenditures in order to develop solutions to decrease the overhead expense; analyze data and then organize findings of the studies and prepare recommendations for implementation of the changes that clients request; examine and analyze demographic data to forecast future marketing trends; review the data marketing and distribution and make recommendations and assist in the implementation of the proposal; review and analyze proposals submitted by the various departments to determine that the benefits derived from the results would justify expenditures. The petitioner asserted that the beneficiary received a bachelor’s degree in business administration and a master’s in business administration. The petitioner noted that the beneficiary has over four years of experience as a market research analyst.

The director requested additional information about the proffered position, specifically, a more detailed description of the day-to-day work done, including specific job duties, the percentage of time spent on each duty, level of responsibility, and hours per week of work. The director requested evidence that the beneficiary is qualified to perform the duties of a specialty occupation. The director requested additional information about the petitioner such as a detailed description of the petitioner’s organization, copies of federal income tax returns, state income tax returns, a payroll summary, quarterly wage reports, and a copy of the petitioner’s organization chart. Additionally, the director requested evidence that the beneficiary was in valid nonimmigrant status at the time the present petition was filed and was employed pursuant to the terms of the initial Form I-129 approved petition.

In response to the director’s request the petitioner indicated the following about the duties of the position, Market Research Analyst/Marketing Director:

- Gathers data on competitors and analyzes prices, sales, and methods of marketing and distribution (20% of time);

- Provides management with information needed to make decisions on the promotion, distribution and pricing of company's products and services and/or to determine the advisability of adding new lines of merchandise, opening new markets or otherwise diversifying the company's operations (30% of time);
- Designing an effective marketing survey (10% of time);
- Distributes surveys to customers and potential buyers regarding their preference (10% of time);
- Allocates materials (15% of time);
- Organizes and maintains information (100% of time);
- Conducts research into past market information and relates them to current situations (20% of time);

Collateral Functions

- Contributes to marketing effectiveness by identifying short-term and long-range issues that must be addressed; providing information and commentary pertinent to deliberations; recommending options and course of action; implementing directives (20% of time);
- Provides short and long term market forecasts and reports by directing market research collection, analysis, and interpretation of market data (20% of time);
- Maintains research data base by identifying and assembling marketing information (100% of time);
- Provides marketing information by answering questions and requests (30% of time).

The petitioner submitted a copy of its 1120S Federal Income Tax Returns which indicated \$21,567,475 in gross receipts or sales. The petitioner submitted an internet printout of electronic items that it sells. The petitioner submitted the requested payroll documents and quarterly tax returns. The petitioner submitted an organization chart which indicated that the beneficiary was employed in the position of market research analyst/marketing management director.

In his denial, the director noted that many of the duties of the position appear to reflect many of those performed by market research analysts as listed under market and survey researchers in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*.) The director indicated that sole reliance on a list of duties taken from the *Handbook* or any other publication to establish that the proffered position qualifies as a specialty occupation, is misplaced. Additionally, the director found that the duties appeared to reflect the duties of a marketing manager. The director noted that market research analysts research, compile, and analyze market data, and advise management and that the duties do not include acting on that data. The director found that although the proffered position may require some market analysis, the duties described are more similar to those of a marketing manager. Furthermore, the director found that the evidence failed to establish that the petitioner engages in the type of business for which a market research analyst would typically be required on a full or part-time basis. The director refers to the Department of Labor *Occupational Outlook Handbook* (the *Handbook*) which reveals that marketing managers develop the firm's marketing strategy and determine the demand for products and services offered by the firm and its competitors as well as identify potential markets. The director noted that the *Handbook* stated that a wide range of backgrounds is suitable for entry into the marketing manager position and does not qualify as a specialty occupation.

Due to the size and nature of the petitioner's business and nature of the duties of the proffered position, the director had concerns whether the beneficiary would be able to continue to perform the services of a market research analyst. The director found that the petitioner failed to establish that the proffered position was a specialty occupation.

The AAO shares the director's concerns regarding the employment that has been described by the petitioner.

The *Handbook*, at page 173, states the following with regard to the employment of market research analysts:

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

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. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways

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

The occupation of a market research analyst is a specialty occupation, normally requiring those seeking entry-level employment to have a master's degree in a related field. However, while the petitioner has identified its position as that of a market research analyst, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention.

At the time of filing, the petitioner offered a description of the beneficiary's duties, one that appeared to describe the occupation of marketing manager with duties such as examining and analyzing demographic data to forecast future marketing trends; reviewing the data marketing and distribution and making recommendations and assisting in the implementation of the proposal; reviewing and analyzing proposals submitted by the various departments to determine the benefits derived from the results that would justify expenditures." In response to the director's request for evidence, the petitioner submitted a description of job duties very similar to the duties listed in the *Handbook* for market research analysts. Its only references to the beneficiary's role within the petitioner's business were phrased in general terms, e.g., "designing an effective marketing survey" and "distributes surveys to customers and potential buyers regarding their preference." The information provided by the petitioner does not explain the duties of the position in the context of the petitioner's ongoing business.

On appeal, counsel asserts that the proffered position is that of a market research analyst and because the *Handbook* finds that a market research analyst is a specialty occupation so is the proffered position. Counsel refers to three unpublished decisions and relies on the list of duties found in the *Handbook* under market research analyst to support his assertions. Counsel refers specifically to an unpublished decision in which the AAO determined that a position met the requirements of a specialty occupation when using language found in the position descriptions of the *Handbook*. Counsel has furnished no evidence to establish that the facts of the

instant petition are analogous to those in the unpublished decisions. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Additionally, the AAO notes that CIS previously approved an H-1B petition for this beneficiary for the same position as the one in the instant petition. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

On appeal, counsel contends that the nature of the petitioner entity's business operations is not a factor to be considered in H-1B matters. However, case law and the regulations indicate that 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).

A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst establishes research methodologies or performs market analyses. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

The petitioner has offered no description of the duties of its proffered position beyond the generalized description it provided in response to the director's request for evidence. It cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not provided examples of the marketing strategies the beneficiary has already produced for the petitioner. The petitioner's generalized statements about the duties to be performed cannot substitute for a description of the specific duties to be performed by the beneficiary. As previously noted, CIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. The petitioner has not provided information about the number of customers it serves or the types of information the market research analyst will analyze. Additionally, the petitioner has not adequately described its business in order for the AAO to understand how the market research analyst will fulfill her duties. The petitioner sells electronics to wholesalers and dealers. The petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, whether the position is that of a market research analyst. The

petitioner has not provided evidence of the market research work that the beneficiary has completed for the petitioner that would illustrate the position's duties. Further, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the 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. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services.

Therefore, for the reasons related in the preceding discussion, 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.