

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



DZ

FILE: EAC 03 067 55448 Office: VERMONT SERVICE CENTER Date: DEC 22 2005

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 Vermont Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is a wholesale distributor of food products and related goods and commodities, with 20 employees. It seeks to employ the beneficiary as a merchandise manager 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 he determined the position was not 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) the petitioner's response to the director's request for evidence; (3) the director's denial letter; (4) Form I-290B, with prior counsel's brief; (5) the AAO's dismissal of the appeal; and (6) current counsel's motion to reconsider. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 merchandise manager. Evidence of the beneficiary’s duties includes: the Form I-129; a July 22, 2002 letter of support from the petitioner; and its March 18, 2003 response to the director’s request for evidence. At the time of filing, the petitioner stated that the proffered position would require the beneficiary to:

- Participate in the development of and supervise the implementation of marketing and merchandising strategies and programs to achieve sales and profit objectives for assigned food products and related commodities;
- Supervise the development and implementation of marketing plans, which will leverage current product strengths and opportunities in the market;
- Collaborate with outside companies as necessary to integrate new or improved food products and related commodities into marketing strategies and programs;
- Assess and evaluate the management of all service objectives and identify potential problems and opportunities, and make recommendations for appropriate courses of action;
- Develop systems for the periodic review of marginally profitable products, monitor performance, and make recommendations for appropriate course of action, including the justifiable deletion of service lines, where appropriate;
- Collaborate with others to coordinate and supervise all activities necessary to the timely introduction of new food products and related commodities, including preparatory market research, concept tests, financial analysis, etc;
- Supervise the development and production of appropriate advertising, marketing, merchandising and promotional materials in accordance with established budgetary, financial, quality, and other standards, guidelines and restrictions;
- Consult and collaborate, where necessary, with company attorneys, certified public accounts and other outside professional services concerning advertising, sales promotion,

- marketing and other strategies to assure compliance with all regulatory agencies and applicable laws and statutes;
- Supervise and administer advertising and marketing budgets, assure compliance with budgetary and financial guidelines, and maximize cost effectiveness and utilization of funds;
 - Evaluate marketing programs against established performance objectives;
 - Consult with company personnel as necessary to assure maximum manpower utilization and development;
 - Establish well-defined employee performance standards and assure constructive employee appraisals and evaluations;
 - Evaluate the success of marketing and sales programs with company management and recommend adjustments and changes to achieve desired results;
 - Review and evaluate competitive products, services and companies, and their apparent marketing strategies;
 - Develop and recommend programs that will respond to current and projected competitive action; and
 - Provide input and guidance to appropriate company personnel to ensure that projects are designed to meet or exceed client needs at the outset.

On appeal, prior counsel asserted that the above description of the proffered positions duties satisfied the requirements of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the nature of the specific duties is so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Current counsel makes this same case in the motion that is now before the AAO. He contends “that effective performance of any function that involves analysis of statistical data; product price review and analysis; analysis of product costs, pricing, sales data and profit, among other related duties, are complex enough to justify requiring knowledge of theoretical [of] principles acquired from attending a four-year college course. Data gathering for statistical purposes and then analyzing data gathered requires the application of principles learned in college.”

Based on counsel’s statements, the AAO finds the issue before it to be whether CIS has failed to appreciate the complexity of the duties of the proffered position and has, therefore, erred in determining that such duties do not establish the proffered position as a specialty occupation under the specialized and complex threshold set by 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Accordingly, the AAO will not conduct a second *de novo* review of the entire record, but will limit its consideration to the issues raised by counsel.

Counsel contends that the duties of the proffered position require the kind of knowledge that may only be acquired through a baccalaureate degree program. He asserts that the petitioner’s response to the director’s request for evidence provides sufficient evidence to show that employment in the proffered position would require a degree.

The AAO has previously found the petitioner’s description of the duties of the proffered position to be those of a marketing manager and to fall generally within the occupation of advertising, marketing, promotions, public relations and sales managers, as discussed at pages 23-25 of the Department of Labor’s *Occupational Outlook Handbook*, 2004-2005 edition. Such employment does not normally require job candidates seeking entry-level employment to hold the minimum of a baccalaureate degree or its equivalent. Instead, the *Handbook* indicates that most marketing manager positions are filled “by promoting experienced staff or

related professional personnel.” (*Handbook*, page 25) Accordingly, to establish the proffered position as a specialty occupation under the specialized and complex threshold of the fourth criterion, the petitioner must distinguish its duties from those generally performed by marketing managers.

However, the petitioner’s discussion of the proffered position’s responsibilities, while it describes a position with significant responsibility, does not indicate that the duties to be performed by the beneficiary would require a greater level of knowledge or skill than that normally possessed by marketing managers whose business responsibilities routinely require them to survey and analyze their firms’ business performance, as well as consumer behavior. Neither does it describe duties that represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. In the absence of duties that would somehow set the proffered position apart from other marketing manager employment, the petitioner’s response to the director’s request for evidence does not establish the proffered position as a specialty occupation based on the complexity and specialization of its duties.

In reaching its decision, the AAO has noted counsel’s contention that any employment requiring the analysis of statistical data, product prices and costs, states and profit data is complex enough to justify a four-year degree requirement. However, counsel’s assertions in this regard are offered without evidence to support them, e.g., expert opinions or statements from industry associations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner’s burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, counsel’s statements regarding the complexity of the proffered position’s duties cannot establish the proffered position as a specialty occupation.

Nevertheless, his assertions regarding the analytical duties of the proffered position have led the AAO to consider whether certain of these duties might be characterized as those of market or marketing research analysts, employment that is also concerned with the selling of products and services but which requires job seekers to hold academic degrees at the master’s level in business administration, marketing, statistics, communications, or other related discipline. (*Handbook*, page 174). However, while the petitioner has indicated that the beneficiary would be required to perform a range of analytical tasks related to the marketing of its business, it has not described the work of market research analysts who, as stated at page 173 of the *Handbook*:

[a]nalyze 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.

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

The petitioner's description of its proffered position does not indicate that the beneficiary would be required to develop either the original market data or analysis just described. Instead, it outlines the type of business review and evaluation typically performed by managers whose job it is to increase their firms' market share. In its listing of the specific tasks to be performed by the beneficiary, the petitioner clearly indicates the managerial nature of the beneficiary's analytical responsibilities when it states that he would be required to "coordinate and supervise all activities necessary to the timely introduction of new food products and related commodities, including preparatory market research, concept tests, financial analysis, etc." Accordingly, the AAO does not find the petitioner's references to the beneficiary's responsibility for compiling data related to productivity and income, and for researching and analyzing current and potential markets to require the beneficiary to perform the hands-on analytical duties of a market research analyst, employment that would impose a degree requirement on the beneficiary.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. Accordingly, the AAO will affirm its previous decision.

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 decision of the AAO is affirmed. The petition is denied.