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



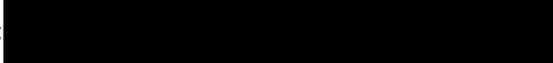
U.S. Citizenship
and Immigration
Services

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DA

FILE: WAC 04 156 53960 Office: CALIFORNIA SERVICE CENTER Date: **DEC 23 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 importer of fine spirits, with seven employees. It seeks to employ the beneficiary as a director of strategic sales 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) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's statement. The AAO reviewed the record in its entirety before reaching its decision.

On appeal, counsel indicates her intention to file a brief and/or evidence within 30 days. However, no brief or additional evidence is found in the file. In response to a November 28, 2005 inquiry by the AAO, counsel states that she did not submit the referenced brief or evidence.

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 seeks the beneficiary’s services as a director of strategic sales. Evidence of the beneficiary’s duties includes: the Form I-129; and counsel’s August 3, 2004 response to the director’s request for evidence.

At the time of filing, the petitioner indicated that the proffered position would require the beneficiary to:

- Coordinate sales distribution by establishing sales territories and goals;
- Advise dealers, distributors and clients concerning sales and advertising techniques;
- Analyze sales statistics to formulate policy;
- Assist dealers in promoting sales;
- Review market analyses to determine customer needs, volume potential, price schedules and discount rates; and
- Develop sales campaigns to accommodate sales.

In response to the director’s request for evidence, counsel submitted a further description of the above duties, indicating the beneficiary would:

- Provide expertise and guidance to sales staff, as well as outside wholesale distribution teams, and examine and analyze statistical data to forecast future marketing trends;
- Be responsible for marketing direction, and research market conditions in local, regional, and national areas to determine sales of product;
- Develop and cultivate relationships with consumer vendors to expand sales markets; gather data on competitors; analyze prices, sales and methods of marketing and distribution; and collect data on customer preferences and buying habits;
- Negotiate and maintain business relationships with manufacturers in Mexico; and

- Conduct informational seminars to educate consumers as well as industry professionals on the petitioner's brands; and prepare reports and graphic illustrations of findings from market research.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director, relying on the 2004-2005 edition of the *Handbook*, concluded that the duties of the proffered position did not reflect the employment of a marketing research analyst, as stated by the petitioner. He further determined that the record failed to establish that the petitioner's business was of the type or complexity to require a market research analyst. As discussed below, the AAO concurs in the director's finding that the proffered position is not that of a market research analyst. However, it finds the director to have erred in concluding that the petitioner is not engaged in the type of business that would require a marketing research analyst. In that the *Handbook* indicates that the work of marketing research analysts is concerned with the potential sales of products or services and that they provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services, market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner is a retail business engaged in the selling of tequila does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of increasing its business opportunities and earnings. Accordingly, the AAO withdraws the director's finding in this regard.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of market or marketing research analysts, as described at pages 173-174 of the *Handbook*. It has taken particular note of the following section of that discussion:

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

The AAO finds that it is market research analysts' work in the design, development and supervision of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicates that the beneficiary would review market analyses, examine and analyze statistical data to forecast marketing trends, research market conditions, gather data on competitors and customer preferences and prepare reports on his market research findings, these responsibilities do not make him a marketing research analyst. The issue is not whether the proffered position requires the beneficiary to do market research, which it does, but whether it is that of a marketing research analyst and requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through a master's degree in business administration, marketing, statistics, communications, or other related field. (*Handbook* at page 174). As the petitioner does not indicate that the proffered position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, the proffered position is not that of a marketing research analyst.

Instead, like the director, the AAO finds the proffered position's duties to be more closely related to the work of sales and marketing managers, who also use marketing research and financial analysis to develop business strategies. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers at pages 23-24 of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

...

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets 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 collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users

...

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives Managers advise the sales representatives on ways to improve their sales performance. In large, multiproduct firms, they oversee regional and local sales managers and their staffs. Sales managers maintain

contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers

Having found the duties of the proffered position to be those of a sales/marketing manager, the AAO now turns to the *Handbook* at pages 24-25, for its discussion of the educational requirements imposed on individuals who seek employment within these professions:

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. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

. . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* indicates no specific degree requirement for employment as a sales or marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner is unable to establish the proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching its decision, the AAO has noted counsel's references to the AAO's approval of H-1B petitions involving strategic management and market research analysts. However, the proffered position is not that of a strategic management or market research analyst. Further, CIS is not bound 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). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In the instant case, the job description provided by the petitioner lists the names of companies like it that impose a degree requirement on similar positions. However, the petitioner's statements do not satisfy the requirements of the criterion's first prong. Going on record without supporting documentation is not sufficient for the purposes of

meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). With regard to the second prong, the record offers no evidence that the proffered position may be distinguished from similar non-degreed employment based on its unique nature or complexity. Accordingly, the petitioner has not established the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. However, the record contains no evidence to establish the petitioner's normal hiring practices with regard to the proffered position. Although the organizational chart submitted in response to the director's request for evidence lists the degrees held by the petitioner's staff, it is not proof of the petitioner's normal hiring practices regarding its employees. The record contains no independent evidence to establish the employment of these individuals by the petitioner, nor does it document that their degrees are in fields directly related to their employment, as required for classification as a specialty occupation. Therefore, the proffered position cannot be established as a specialty occupation based on the petitioner's normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's 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. The petitioner has asserted that the proffered position is highly specialized and can be performed only by an individual with a business education at the baccalaureate or masters level. However, the proffered position's duties, as described by the petitioner, do not reflect a higher degree of knowledge and skill than would normally be required of sales and marketing managers who routinely work in highly complex and competitive environments. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications other than those held by sales and marketing managers. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.