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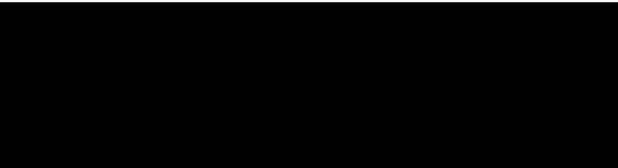
FILE: WAC 04 092 50984 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2005

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 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 wholesale distributor of personal computer products. In order to employ the beneficiary as a marketing management analyst, the petitioner filed this petition to classify the position as an H-1B nonimmigrant worker in a specialty occupation, 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).

The director denied the petition on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

On appeal, counsel submits a brief in which he contends that the director erred by characterizing the proffered position as a marketing management job, and that the educational evaluation submitted into the record establishes that the beneficiary is qualified to serve in the proffered position, which counsel contends is a marketing management analyst position that requires at least a bachelor's degree in business administration.

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, and counsel's brief on appeal.

The petitioner's failure to establish that it is proffering a specialty occupation position will be addressed first.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation:

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The petitioner’s January 9, 2004 letter of support that was submitted with the Form I-129 (Petition for Nonimmigrant Worker) described the proposed duties and their respective percentage of worktime as follows:

- Study products, pricing, distribution and promotional strategies of the company and develop and implement marketing strategies in all of the areas (Overall Responsibility)
- Conduct research, conceptualize and confer with engineers in order to develop new product lines e-business solutions, including research of competitive environment and target markets (20%)

- Explore and establish partnerships with other business entities for distribution of [the petitioner's] products (10%)
- Study the pricing strategies of [the] company. Specifically, study price elasticity and recommend optimal pricing strategies (10%)
- Develop marketing strategies including marketing communication strategies (10%)
- Design and coordinate promotion through direct mail, telemarketing and corporate website (10%)
- Design distribution strategies to reduce costs and increase profitability (10%)
- Develop and implement a marketing strategy for the Company on a five-year cycle (30%)

The petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) by establishing that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty closely related to the position's duties.

CIS recognizes the Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. Counsel appears to maintain that the proffered position comports with the management analyst occupational category, which is discussed at pages 87-90 of the 2004-2005 *Handbook*.¹ These paragraphs from the *Handbook* indicate that performance of the duties of management analyst positions normally require at least a bachelor's degree in a specific specialty that is closely related to the duties:

Firms providing management analysis range in size from a single practitioner to large international organizations employing thousands of consultants. Some analysts and consultants specialize in a specific industry, such as healthcare or telecommunications, while others specialize by type of business function, such as human resources, marketing, logistics, or information systems. In government, management analysts tend to specialize by type of agency. The work of management analysts and consultants varies with each client or employer, and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers.

....

¹ The references herein are to the 2004-2005 edition of the *Handbook*, which the AAO consulted in its deliberation on this proceeding.

Educational requirements for entry-level jobs in this field vary widely between private industry and government. Most employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. Some employers also require additional years of experience in the field in which the worker plans to consult, in addition to a master's degree. Some will hire workers with a bachelor's degree as a research analyst or associate. Research analysts usually need to pursue a master's degree in order to advance to a consulting position. Most government agencies hire people with a bachelor's degree and no pertinent work experience for entry-level management analyst positions.

Few universities or colleges offer formal programs of study in management consulting; however, many fields of study provide a suitable educational background for this occupation because of the wide range of areas addressed by management analysts. These include most academic programs in business and management, such as accounting and marketing, as well as economics, computer and information sciences, and engineering. In addition to the appropriate formal education, most entrants to this occupation have years of experience in management, human resources, information technology, or other specialties. Analysts also routinely attend conferences to keep abreast of current developments in their field.

Read in the context of the entire section in which they appear, the above paragraphs indicate that specific management analyst positions in the private sphere most often involve the application of a master's degree level of knowledge in business administration or in a specialty closely aligned with the particular business aspects which the management analyst would analyze, such as engineering, marketing, or computer science. For research analysts or associates, a bachelor's degree in a specialty would be required. A generalized business degree would not suffice, but a business degree with a concentration in marketing, accounting, or some other business specialty might, depending upon the specific business aspects being analyzed.

In order to determine whether, as claimed, the petitioner has established that the position it has proffered actually requires the knowledge-application and educational credentials of a management analyst, CIS must look beyond the job title and the educational credentials that a petitioner specifies. CIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical evidence is not the title that the petitioner ascribes to the position or this employer's self-imposed standards or hiring preferences. Rather, it is the extent to which specific information about the performance of the proposed work conveys the level of highly specialized knowledge that the beneficiary would theoretically and practically apply. The evidence in this particular record does not establish that the beneficiary's work would involve at least a bachelor's degree level of knowledge in a specific specialty. The proffered position, therefore, does not qualify as a specialty occupation in marketing management analysis or any other field.

The generalized extent to which the proffered position and its duties are presented in the record do not establish that the beneficiary would be working as more than a marketing manager in charge of the petitioner's overall advertising, marketing, promotions, public relations, and sales activities. The section on "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" in the current, 2004-2005 edition of the *Handbook* (at pages

23-26) indicates that a bachelor's degree or higher, or the equivalent, in a specific specialty is not a normal minimum-entry requirement for such a position.

The record's three job vacancy announcements of other employers have no significant evidentiary value. They are not probative of any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The advertisements are too few to be indicative of an industry-wide practice. The record of proceedings does not develop the petitioner's business operations and those of the advertised firms in sufficient detail to warrant a conclusion that they are substantially similar organizations. The advertisements also do not indicate a common requirement for a degree in a specific specialty: the Transcat advertisement specifies "a minimum of a four-year degree from an accredited college or university," but not any particular specialty; the Adeeco advertisement indicates a preference for an MBA, but also indicates that a "BS/BA," undifferentiated by specialty, would be acceptable. Furthermore, the evidence of record does not establish that the positions advertised and the one proffered here are substantially similar in specific duties and in the particular content and level of knowledge that must be applied for successful job performance.

It is also noted that the petitioner indicated that a bachelor's degree in business administration without a concentration in a specific business specialty would be acceptable. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

Because the evidence of record does not establish that the proffered position is one that normally requires at least a baccalaureate degree or its equivalent in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not presented evidence to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is for a position with a requirement for at least a bachelor's degree in a specific specialty that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that the proffered position as one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The record contains no attestations from individuals or other firms or from a professional association that the position is one for which employers in the petitioner's industry have a routine practice of recruiting and hiring only persons with at least a

bachelor's degree in a specific specialty. As noted earlier, the record's job advertisements from other firms are inconsequential. The evidence does not establish that the proffered position and those advertised are sufficiently similar in specific duties and actual performance requirements to be regarded as parallel for purposes of this criterion. Nor does the record establish that the firms advertising are substantially similar to the petitioner. Therefore, the job advertisements are not probative of the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not presented any evidence to establish that the proffered position qualifies as a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), that is, by virtue of an established history of the petitioner's recruiting and requiring for this position only persons with at least a bachelor's degree in a specific specialty.

The evidence of record does not establish either that this particular position is so complex or unique that it can be performed only by an individual with a degree (so as to satisfy the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge usually associated with at least a baccalaureate degree in a specific specialty (so as to satisfy the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)). As noted earlier, the generalized nature of the evidence of record does not establish the exact level of specialized knowledge that performance of the proffered position requires, but it suggests a marketing manager position that does not require a degree in a specific specialty. The AAO notes that the petitioner states on the Form I-129 that it has 160 employees and a gross annual income of \$160 million. No evidence of record substantiates these statements, or indicates that the position is other than that of a marketing manager which does not require a degree in a specialty. Going on record without supporting documentary evidence is not sufficient for 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)).

As discussed above, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

As the proffered position is not a specialty occupation, the beneficiary's qualifications are inconsequential to the outcome of this proceeding. However, the AAO also finds that the director correctly determined that the beneficiary is not qualified to perform in position that is a specialty occupation by virtue of its requiring at least a U.S. bachelor's degree or the equivalent in a specific specialty.

The evidence of record does not establish that the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The director correctly discounted the education evaluation in this proceeding for the failure of the foreign credentials evaluation service to provide a meaningful explanation of how it arrived at its conclusion that the combination of the beneficiary's 1993-1996 coursework in India and his U.S. coursework at the University of California, Los Angeles Extension in Film, Television, Video, and New Media is equivalent to a U.S. bachelor's degree in business administration. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817

(Comm. 1988). As the discounted education evaluation is the critical beneficiary qualification evidence in this particular proceeding, and as the remaining evidence of record does not satisfy the criteria of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D), the petitioner has also failed to establish that the beneficiary is qualified to serve in a specific specialty.

In summary, the appeal will be dismissed for each of these two independent reasons: the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A); and the petitioner has also failed to establish that the beneficiary is qualified to serve in a specialty occupation in accordance with the requirements of 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.