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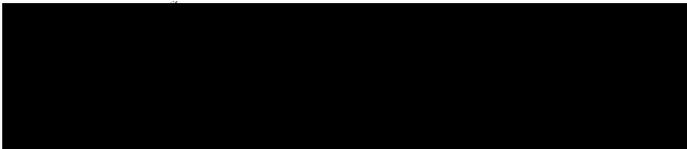
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 05 2005

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 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 and distributor of aftermarket automotive products with seven full-time employees, as well as contractors and temporary employees. It seeks to hire the beneficiary as a management analyst. The director denied the petition based on his determination that the proffered 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 brief, and new and previously-submitted documentation. 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, 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 (5<sup>th</sup> 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 management analyst. Evidence of the beneficiary’s duties includes: the Form I-129; a May 7, 2003 letter of support from the petitioner submitted at the time of filing; and counsel’s December 15, 2003 response to the director’s request for evidence.

At the time of filing, the petitioner stated that, as a result of the rapid growth of its business, it required a management analyst to establish “productive and efficient business and operational procedures.” In response to the director’s request for evidence, counsel divided the specific duties of the position between two major categories – research/analysis and development/recommendations – as follows:

#### Research/Analysis

- Research industry developments to update company products and operating procedures;
- Study and evaluate industry publications and monitor pending legislation/regulations to determine impact on petitioner;
- Study and analyze current international trends in the industry;
- Liaise/correspond with agents, brokers and other parties to determine feasibility and marketability of new products to meet competition and increase sales and profitability;
- Study and evaluate current inventory control, ROI, product performance, etc.
- Study business operations for efficiency, effectiveness and profitability;
- Evaluate marketing initiatives to support strategic market development;
- Analyze business operations to identify cost savings and revenue enhancement opportunities;
- Collect data on operational problems and procedures;
- Benchmark performance of sales of new products and of sales personnel; and
- Plan feasibility studies.

#### Development/Recommendations

- Develop new procedures and materials for introduction and administration of new products, to be reviewed by company and applicable regulatory bodies;

- Plan and carry out projects designed to improve efficiency and productivity of petitioner;
- Provide advice re improving work flow;
- Develop incentive compensation plans for representatives;
- Recommend changes to current and new marketing strategies and plans; and
- Develop weekly/monthly sales forecasts in various markets.

To determine whether the duties just described are those of 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 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 (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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 the petitioner has characterized its position as that of a management analyst, the AAO first turns to the *Handbook's* description of that occupational title. The *Handbook*, at pages 87-88, describes the occupation of management analyst as follows:

As business becomes more complex, the Nation's firms are continually faced with new challenges . . . . Management analysts, often referred to as management consultants in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. For example, a small but rapidly growing company that needs help improving the system of control over inventories and expenses may decide to employ a consultant . . . .

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 . . . while others specialize by type of business function . . . . The work of management analysts and consultants varies with each client or employer, and from project to project . . . . In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers . . . .

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data, which may include annual revenues, employment, or expenditures, and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture . . . .

Once they have decided on a course of action, consultants report their findings and recommendations to the client. These suggestions usually are submitted in writing . . . . For some projects, management analysts are retained to help implement the suggestions they have made.

While the above discussion of management analyst describes employment that requires the collection, review and analysis of information, it does not follow that all employment that includes such responsibilities must be classified under this occupational title. In the instant case, the duties listed by counsel in response to the director's request for evidence, including those that would require the beneficiary to analyze and evaluate the petitioner's operations, do not establish the proffered position as that of a management analyst. Instead, the majority of the duties that counsel has identified as those of a management analyst appear either directly or indirectly related to the petitioner's marketing activities and to describe the employment of marketing, product development, and market research managers, who coordinate the business strategies of companies seeking to increase market share and profitability. Counsel's statement that the beneficiary would supervise sales representatives in carrying out his duties and the organizational placement of the proffered position within the petitioner's sales/marketing division further establish the position's marketing orientation.

As identified in the *Handbook*, at page 23, marketing managers fall within the occupational title of advertising, marketing, promotions, public relations, and sales managers and

. . . 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 – for example, business firms, wholesalers, retailers, government or the general public. 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.

Counsel has stated that the beneficiary would be expected to plan feasibility studies, study and identify ways to improve the petitioner's workflow, and plan and carry out projects to improve efficiency and productivity, activities that might be viewed as those of a management analyst. However, when considered in terms of the proffered position's emphasis on marketing and sales and its organizational placement within the petitioner's sales/marketing division, these duties, instead, appear to be the type of activities and initiatives routinely undertaken by managers charged with improving a firm's marketing and sales performance.

Accordingly, the AAO finds the duties of the proffered position to fall within the occupation of advertising, marketing, promotions, public relations and sales managers, specifically that of marketing managers whose responsibilities also encompass marketing research and product development. A discussion of the preparation needed for employment in this occupation is found at pages 24-25 of the *Handbook*:

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. A bachelor's

degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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 . . . .

In that the *Handbook* states that individuals seeking marketing manager positions may be hired on the basis of experience, the AAO concludes that the proffered position does not constitute employment that normally requires job applicants to hold a baccalaureate or higher degree, or its equivalent. Accordingly, the AAO finds that the position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the proffered position is not that of an advertising, marketing, promotions, public relations, or sales manager and that this finding has no factual support. He states that the beneficiary would not be responsible for promoting the petitioner's products, but for the overall work flow process and profitability of the company. He asserts that the beneficiary would review all the petitioner's schemes, including "marketing, sales, distribution, product flow, shipping routes, etc. to develop and enhance new systems and operating guidelines for efficiency and productivity." Counsel's assertions are not persuasive in light of the specific duties he identified in his response to the director's request for evidence and the petitioner's placement of the beneficiary within its sales/marketing division.

As described by counsel, the beneficiary would be responsible for the types of activities performed by marketing, marketing research and product development managers – conducting research to update the petitioner's products and operating procedures, contacting agents and brokers to determine the feasibility and marketability of new products, evaluating marketing initiatives to support strategic market development, analyzing business operations to identify cost savings and revenue enhancement opportunities, benchmarking sales performance, developing new procedures and materials for the introduction of new products, developing incentive compensation plans for sales representatives, recommending changes to marketing strategies, and developing sales forecasts. Further, counsel's contention that the beneficiary would be responsible for reviewing the overall work flow of the petitioner is not supported by the organizational chart submitted by the petitioner. On that chart, the proffered position of management analyst has been placed within the sales/marketing division, reporting to the head of that division. The description of the management analyst position accompanying that chart states: "Responsible for research of industry developments for the purpose of updating company products and operating procedures. Responsible for analyzing business operations to identify cost savings and revenue enhancement opportunities. Plan and carry out projects designed to improve the efficiency and productivity of the company." Nothing in this statement indicates that the

beneficiary's responsibilities would extend beyond the sales/marketing division, nor does it describe duties that fall outside the occupation of marketing, marketing research and product development managers.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4) – establish that a 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. Counsel has submitted six Internet job postings to establish the petitioner's degree requirement as the norm within its industry. However, these announcements cannot serve as evidence of an industry norm. They advertise openings for management analysts and the proffered position is not that of a management analyst. Further, the organizations represented by these postings are not similar to the petitioner. Two announcements come from a management-consulting firm, one from a producer and distributor of entertainment products, one from an information technology design and development business, one from a textile business, and one from a healthcare provider organization. None are businesses engaged in the importation and distribution of automotive products. As a result, they do not establish that the petitioner's degree requirement is common among parallel positions in similar organizations.

Further, the AAO also concludes that the record before it does not establish that petitioner's position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. It finds no evidence in the record that would support such a finding. Accordingly, the petitioner cannot establish its 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)(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 the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In response to the director's request for evidence, counsel stated that the employer had always required a degree for the position of management analyst and referenced the job descriptions submitted by the petitioner with its organizational chart. Counsel's statements are not, however, supported by the record. The petitioner's May 7, 2003 letter of support indicated that the proffered position was newly created in response to its recent rapid growth. Moreover, the job descriptions submitted by the petitioner do not establish that the petitioner normally requires a degree for the proffered or similar positions. While some of the descriptions indicate a degree requirement, the record contains no evidence to document that the individuals who hold or who have held these positions have degrees in their respective specialties. As the petitioner has submitted no evidence to establish its past hiring practices, the proffered position cannot be established as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel contends that the proffered position is established as a specialty occupation as the petitioner's recruitment for the proffered position included a degree requirement. He submits the petitioner's Internet posting advertising the proffered position as documentation.

While the AAO acknowledges the petitioner's desire to hire an individual with a bachelor's degree to fill its position, it is not the petitioner's preferences that dictate whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). Were CIS limited to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. The AAO also notes that the petitioner's Internet announcement indicates only that a bachelor's degree is required for employment rather than a degree in a specialty directly related to the proffered position. As already discussed, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate degree or higher degree but one in a specific specialty that is directly related to the proffered position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In his response to the director's request for evidence, counsel asserted that the duties of the proffered position were those of a management analyst and required skills and knowledge "attributed only to individuals with at least a baccalaureate degree in business administration or its equivalent." However, the AAO has determined that the proffered position reflects the duties of marketing, marketing research and production development managers. Its review of the position's duties has not found them to require a higher degree of knowledge and skill than would normally be expected of a marketing manager. Therefore, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel also cites a series of CIS decisions – instances in which jobs involving management, market, and business analysis has been found to qualify as specialty occupations – as evidence that the work of management analysts qualifies as a specialty occupation. However, as the proffered position is not that of a management analyst, such decisions are not probative for the purposes of this proceeding. Further, CIS' previous approval of petitions for what might appear to be similar positions cannot serve as a basis for approving the instant petition. 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).

Therefore, 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). 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.