



U.S. Citizenship
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Services

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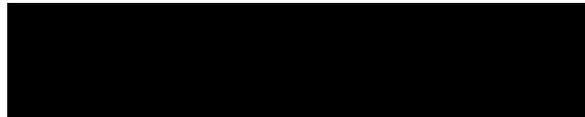


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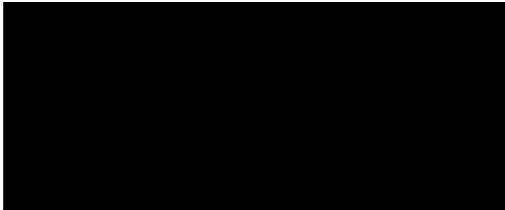
FILE: EAC 03 054 54253 Office: VERMONT SERVICE CENTER Date:

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.

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Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 software consulting and development company, with three employees. It seeks to hire the beneficiary as a marketing research analyst. The director denied the petition based on her 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 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 (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 marketing research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; a November 20, 2002 letter of support from the petitioner; and counsel’s June 24, 2003 response to the director’s request for evidence, which included a detailed discussion of the petitioner’s marketing/business plan.

At the time of filing, the petitioner stated that the beneficiary would be required to:

- Perform market and feasibility analyses;
- Write marketing plans and identify clients;
- Establish research methodologies;
- Examine and analyze statistical data to forecast future market trends in the information technology area;
- Place consultants and programmers with and for clients on a temporary and permanent basis; and
- Sell software services and other specialized work.

In response to the director’s request for evidence, counsel offered a detailed description of the petitioner’s marketing/business plan, which also included information on the role the beneficiary would play within that plan. In outlining the petitioner’s sales strategy, counsel identified a series of information-gathering initiatives intended to develop marketing information, including face-to-face interviews with prospective clients; networking with interest groups; telephone, mail and e-mail surveys; responding to requests for proposals; channel marketing studies; interviews with industry executives; and exit surveys that would follow completion of the petitioner’s projects. Counsel indicated that the market analyst would gather data from studying the results of these surveys and stated that a combination of the research initiatives “under the direction and control of an experienced marketing analyst” would ensure the effectiveness of the petitioner’s marketing campaigns. The AAO notes, however, that counsel did not indicate the beneficiary would be involved in the design of such studies, one of the activities that define the occupation of market research.

In her denial, the director questioned whether the petitioner had sufficient H-1B work to employ the beneficiary for the requested period of time, as well as its need for the services of a market analyst. The AAO does not agree with the director’s conclusions regarding the industries in need of market research analysts.

Based on the discussion of the occupation in the 2004-2005 edition of the *Handbook*, it concludes that such analysts may reasonably be found in virtually every industry and business seeking to enhance the sales of its products and/or services. However, the AAO does share 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 marketing 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 generic description of the beneficiary's market research duties, one that appeared to describe the occupation of market research analyst rather than the proffered position. The director found this description insufficient to establish the position as a specialty occupation and asked for further information, specifically requesting a description of each project in which the beneficiary would be involved during the following year and the relationship between these projects and the petitioner's business plan. In response, counsel provided a description of the petitioner's business plan to increase its sales, including a specific discussion of the methods to be used by the petitioner in gathering the data necessary to develop a marketing strategy, as well as the type of audiences to be targeted. He contended in this response that the petitioner's well-defined business plan established its proffered position as a specialty occupation, but failed to offer a detailed description of the beneficiary's duties. His only references to the beneficiary's role within the petitioner's business plan were phrased in general terms, e.g., "the market analyst can gather valuable data," "methodologies will help gather data which the market analyst will study," and, "[a] combination of these factors under the direction and control of an experienced Marketing Analyst would ensure the maximum effectiveness of our marketing campaigns."

On appeal, counsel contends that the very similarity between the petitioner's description of its proffered position and the *Handbook's* discussion of the occupation of market research analyst should be a basis for approval. The AAO does not agree. 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.

In the instant case, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. 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). While counsel has contended that the petitioner's marketing plan establishes the nature of its proffered position, a description of the petitioner's strategy for expanding its business, however detailed, 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. However, 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. 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.