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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

D2

[Redacted]

FILE:

[Redacted]

Office:

CALIFORNIA SERVICE CENTER

[Redacted]

Date:

MAY 24 2005

IN RE:

Petitioner:

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:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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 service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a dry cleaning business. It seeks to employ the beneficiary as a market research analyst and to classify her as a nonimmigrant worker in a specialty occupation 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 on the ground that the proffered position does not qualify as 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.

As provided in 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 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and an accompanying letter the petitioner described itself as a dry cleaning business established in 1997 with five employees and gross annual income of \$300,000. The petitioner stated that its business was expanding and that it proposed to hire the beneficiary as a full-time market research analyst to facilitate that expansion. In its subsequent response to the RFE, the petitioner stated that the market research analyst would determine demand for the company's products and services and assist in formulating the company's overall marketing policy with the aim of further expansion. The petitioner described the duties of the proffered position, and the percentage of time required to perform each duty, as follows:

- Performing detailed market research and review of studies and analysis of established and prospective customers and their preferences – 40%.
- Examining and analyzing statistical data and using precise mathematical methods to forecast future marketing trends; collecting and analyzing data on competitors and performing in-depth analysis of prices, sales methods, marketing and services distribution methods, and costs in order to determine the company's marketing strategies; assisting in establishing pricing policies to maximize company profitability – 30%.
- Preparing reports and graphic illustrations for the owner's use in deciding on the company's operating policies; maintaining and providing the company's owner with general information about marketing and economic conditions of the targeted consumer areas, compiling statistical and demographic analysis and reports concerning the advisability and viability of expanding company services in the targeted areas – 30%.

The petitioner asserted that the proffered position required at least a bachelor's degree in economics, marketing, communications, or a related field. The beneficiary earned a bachelor of science in commerce from De La Salle University in the Philippines in 1991 and a bachelor of arts degree from the same university in 1997.

In his decision the director indicated that some of the duties described by the petitioner reflected the duties performed by market research analysts, as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*. However, he was not persuaded that the beneficiary would actually perform the duties of a market research analyst. In the director's view the evidence failed to establish that the type of business run by the petitioner required the ongoing services of a market research analyst, most of whom work for organizations of greater size and scope such as marketing and management research firms, banks, securities and commodities brokers, computer and data processing companies, government agencies, and academic institutions. The director found that any market research analysis involved in the proffered position would be incidental to sales and marketing duties, and determined that the duties of the proffered position more closely resembled those of a marketing manager, as described in the *Handbook*. Based on the *Handbook's* description of a marketing manager's educational requirements the director determined that a bachelor's degree in a specific specialty was not normally required for entry into the occupation. The director was not persuaded by the evidence of record that the proffered position could not be performed by an experienced individual with less than a baccalaureate degree in a specific specialty. The director concluded that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel asserts that the director erred in categorizing the proffered position as a marketing manager, as described in the *Handbook*. Counsel contends that the duties of the position reflect those of a market research analyst, as described in the *Handbook*, and that the beneficiary will actually be performing such duties. Even if the proffered position is deemed to be a marketing manager, however, counsel contends that it would still qualify as a specialty occupation because a baccalaureate degree is required for entry into such a position. As evidence thereof counsel submitted a series of internet job postings for marketing managers which require baccalaureate degrees. Counsel also submitted a series of internet job postings for market research analysts requiring baccalaureate degrees in specific specialties. Counsel reiterated the petitioner's stance that the duties of the proffered position are specialized and complex, requiring the services of an individual with baccalaureate level knowledge and experience in marketing and/or related specialties.

The duties of a market research analyst are described as follows in the *Handbook*, 2004-05 edition, at page 173:

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

After compiling the data, market research analysts evaluate it 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 . . . adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. [They] might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The *Handbook* goes on to state that a master's degree in business administration, marketing, statistics, communications, or a related discipline is generally the minimum requirement for market research analysts in the private sector. *Id.* at 174. Thus, market research analysts are a specialty occupation.

The duties of a marketing manager, by comparison, are described as follows in the *Handbook*, at page 23:

Marketing managers develop the firm's detailed marketing strategy. . . . [T]hey 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. . . . [T]hey monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising managers to promote the firm's products and services and to attract potential users.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are determinative, not the title of the position. The petitioner must show that the performance demands of the position compel its degree requirement. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

The record in this case does not establish that the performance demands of the proffered position are at such a level of specialization or complexity that they require a market research analyst with a master's degree in marketing or a related specialty. Considering the nature of the petitioner's business, the scale of its operations, and the specific duties of the proffered position, the AAO agrees with the director's detailed analysis and conclusion that the proffered position most closely resembles that of a marketing manager, as described in the *Handbook*. With respect to the educational requirements of a marketing manager position, the *Handbook* states the following:

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.

Handbook, id., at page 24. As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal, industry-wide requirement for entry into a marketing manager position. Thus, a marketing manager does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement to enter into the particular position.

The proffered position does not meet the second alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Though counsel has submitted three internet job postings for marketing managers requiring baccalaureate degrees, only one of them specifies that the degree must be in marketing, sales, or another job-related field. The other two postings require only that applicants have a baccalaureate degree, without specification, plus work experience. Furthermore the three advertising companies are all in different lines of business than the petitioner and clearly much larger than the petitioner in their scale of operations. As for the four internet job postings for market research analyst

positions submitted on appeal, and the five previously submitted in response to the RFE, they also involve organizations that are in different lines of business than the petitioner and clearly much larger than the petitioner in their scale of operations. Thus, the internet job postings in the record do not involve parallel positions or similar organizations to those involved in the instant petition. Accordingly, the job postings do not represent persuasive evidence that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record demonstrate that the proffered position is so complex or unique that a baccalaureate or higher degree in a specific specialty is required to perform the job. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Accordingly, the petitioner cannot demonstrate that it normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that they require specialized knowledge at the level of a baccalaureate or higher degree. The evidence does not demonstrate that the knowledge required to perform the duties of the position exceeds that of a typical marketing manager in its scope or complexity. Since a marketing manager does not normally require baccalaureate level knowledge in a specific specialty, the position does not qualify as a specialty occupation under the fourth alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the record does not establish that the position proffered by the petitioner meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. Thus, the petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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