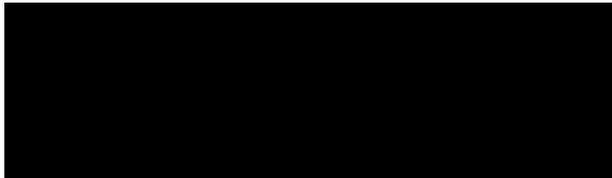


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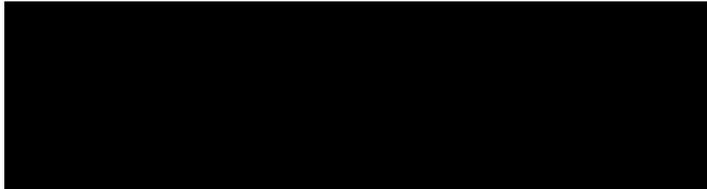
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FILE: WAC 03 203 52615 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 2005

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

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 sustained. The petition will be approved.

The petitioner is a distributor of semiconductor equipment. It seeks to employ the beneficiary as a market research analyst and to continue her classification 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 record failed to establish that the proffered position is 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 and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

On Form I-129 and an accompanying letter the petitioner described itself as the U.S. subsidiary of a Korean manufacturer of semiconductor equipment. The petitioner was established in 1999 to market the parent company's products worldwide. Leading customers, according to the petitioner, include LSI [REDACTED] and [REDACTED]

[REDACTED] The petitioner proposes to employ the beneficiary as a market research analyst, the duties of which are as follows:

research market conditions in national and international arenas to determine potential sales of semiconductor manufacturing equipment such as photo-masks and automatic-layer CVDs; establish research methodology and design format for data gathering using applied math and statistics skills; collect and analyze statistical data on past sales to forecast future marketing trends using statistics, theory of patterns of discovery, financial accounting, and macro-economics; collect and analyze statistical data on competitors' theory of management psychology; prepare reports of findings and advise board of directors of the results of all research.

The beneficiary is qualified to perform the job, the petitioner declares, by virtue of his bachelor of arts degree in economics and management from Emmanuel College in Boston, Massachusetts. The record includes a photocopy of the beneficiary's degree, along with his official transcripts, confirming that he received a bachelor of arts degree, majoring in economics and management, on December 31, 1999.

In response to the RFE the petitioner provided additional documentation, including such items as the company's business plan; an organizational chart showing six employees including the beneficiary; federal income tax returns showing gross receipts of approximately \$2.8 million in 2000, \$5.6 million in 2001, and \$1.5 million in 2002; additional business records; as well as a variety of company brochures and photographs of the premises.

In his decision the director determined that the duties of the proffered position, though they included some functions of market research and analysis, are primarily those of a marketing manager as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. The *Handbook*, as the director pointed out, indicates that a baccalaureate level of education in a specific specialty is not a normal, industry-wide requirement for entry into the occupation. The record did not establish that a degree requirement in a specific field of study is common to the industry in parallel positions among similar organizations, the director stated, or that the proffered position is so complex or unique that it could only be performed by an individual with a degree in a specific specialty. The director noted that no documentation had been submitted showing that the petitioner had previously hired the beneficiary for the position or required the beneficiary, or any other individual in the position, to have a degree in a specific specialty. Nor did the record establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher 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).

On appeal counsel asserts that the director erred in failing to give deference to the service center's approval of the petitioner's previous H-1B petition on behalf of the beneficiary. Counsel states that the prior petition was approved on January 5, 2001, and that the beneficiary's H-1B status should be

continued under the instant petition because there has been no change in the underlying facts of the beneficiary's employment. Counsel contends that the international scope of the petitioner's business, as the marketer and distributor of the parent company's products in the North American region, and the multimillion dollar annual sales achieved during the three years prior to the filing of the petition validates its need for a market research analyst. Counsel also contends that the petitioner's president is invested with sales duties, not the market research analyst, so it is erroneous to categorize the proffered position as that of a marketing manager.

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, Inc. v. Reno, id.*, at 1165-66.

In accord with the director's decision, the AAO is not-persuaded by the evidence of record, including the nature and scope of the petitioner's business, that the duties of the proffered position are primarily those of a market research analyst. The AAO agrees with the director that while the duties appear to involve some market research and analysis functions, the position is primarily that of a marketing manager. As described in the DOL *Handbook*, 2004-05 edition, 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.

With respect to the educational requirements of a marketing manager, the *Handbook* states as follows:

A wide range of educational backgrounds is suitable for entry into . . . marketing . . . 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.

For marketing . . . management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in

engineering or science, combined with a master's degree in business administration, is preferred

Most . . . marketing . . . 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 . . . specialists.

Id. at 24-25. 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 or sales manager position. Though some employers prefer a business degree with a focus on marketing or a business degree in combination with an engineering/science degree, others give favorable consideration to a broad spectrum of degrees and relevant work experience in hiring a marketing manager. 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 or higher degree in a specific specialty is not the normal minimum requirement to enter into such a position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Nor does the evidence of record demonstrate that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. Accordingly, the proffered position does not qualify as a specialty occupation under either 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 for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

With regard to the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4), the petitioner must demonstrate that the duties of the proffered position are so specialized and complex that baccalaureate level knowledge, or higher, is required to perform them. As previously discussed, the AAO is persuaded by the evidence of record, including the petitioner's description of the job duties, that the proffered position includes some market research and analysis functions that exceed the scope of a basic marketing manager position. The AAO also notes such factors as the technical nature of the products being marketed, identified by the petitioner in a company brochure as photomasks and semiconductor production equipment; the nature of the clientele, as indicated in the list of leading customers provided by the petitioner; and the geographical extent of the target market, the North American continent. Taking these factors into consideration, as well as the market research and analysis functions of the job, the AAO is persuaded that the duties of the proffered position are more specialized and complex than those of a typical marketing manager and that knowledge usually associated with the attainment of a baccalaureate degree is required to perform those duties. The AAO concludes that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As provided in 8 C.F.R. § 214.2(h)(4)(iii)(C), the beneficiary must meet one of the following criteria to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record establishes that the beneficiary holds a bachelor of arts degree, majoring in economics and management, from Emmanuel College in Boston, Massachusetts. The AAO determines that this degree meets the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(C)(1) and thereby qualifies the beneficiary to perform the services of the specialty occupation.

Thus, the record establishes that the proffered position is a specialty occupation and that the beneficiary is qualified to perform the services of that occupation.

ORDER: The appeal is sustained. The petition is approved.