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FILE: WAC 04 059 50939 Office: CALIFORNIA SERVICE CENTER Date: OCT 26 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 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 designer and manufacturer of ready-to-wear clothing. 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 record failed to establish that the proffered position qualifies 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 and an appeal brief. 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 designer and manufacturer of ready-to-wear clothing as well as an importer and distributor of women's clothing and fashion accessories. The petitioner indicated that its business was established in 1997 and had three employees and a gross annual income of approximately \$106,000 in 2003. The petitioner stated that it intended to hire the beneficiary as a market research analyst to perform such tasks as "gathering and analyzing information and statistical data on past sales to predict future sales and marketing trends . . . devising methods and procedures to be used in obtaining the information and statistical data earlier mentioned . . . [and] evaluating them and making recommendations based upon her market research analysis." The beneficiary is qualified for the job, the petitioner indicated, by virtue of her bachelor of science in commerce degree, with a major in marketing, from Far Eastern University in Manila, the Philippines, awarded on December 12, 1970, as well as her extensive professional experience.

In response to the RFE the petitioner listed the duties of the position, and the percentage of time required by each duty, as follows:

**Market Research – 40%**

- [The beneficiary] will undertake market research and analysis on the following key areas: service positioning; service development; pricing; advertising; customer wants/needs; competitive activities.
- She will analyze and interpret past, present and future marketing trends and consumer demands for our products.
- She will conduct opinion research to determine public attitude and acceptance of our product lines. The results of these surveys and opinion researches are important in creating a marketing campaign based on the clients' preferences and orientation.

**Research Design – 20%**

- [The beneficiary] will design and set up methods of data collection, processing, analysis, interpretation, reporting and client liaison.
- She will plan and conduct research that answers marketing questions. After the data is gathered, the beneficiary will determine what it means and then write a report for the company recommending a course of action.
- She will design telephone, personal, or mail interview surveys to assess clientele preferences and formulate recommendations for maintaining service quality appreciation to clients.

**Data Gathering – 20%**

- [The beneficiary] will gather vital data respecting petitioner's competitors, analyze their service methods, and conduct evaluation of their techniques in marketing promotion and distribution, all of which shall be used for determining the advisability of utilizing new approaches in petitioner's desired markets.

**Implementation and Analysis – 20%**

- [The beneficiary] will work with numbers and statistics.
- She will also handle daily telephone contact with clients regarding requests for information and analysis.
- She will contribute to the creation of the firm's intellectual capital and industry expertise.

In his decision the director stated that, while some of the duties of the proffered position appeared to be those of a market research analyst, in accordance with the description of that occupation in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, the position could not be classified as a market research analyst for two reasons. The first was that the petitioner's business operations, as far as the record showed, did not have the organizational complexity that would require the services of a market research analyst. The second reason was that the petitioner was not engaged in a type of business for which a market research analyst would normally be required in a full-time, ongoing capacity. Based on the duties of the job the director found that the proffered position is similar to that of a marketing manager, as described in the DOL *Handbook*. According to the *Handbook*, the director pointed out, a bachelor's degree in a specific specialty is not a normal, industry-wide minimum requirement for entry into the occupation. Nor was the director persuaded by the evidence of record that the proffered position qualifies as a specialty occupation under any other criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal the petitioner asserts that the director erred in finding that the duties of the proffered position were not those of a market research analyst. The petitioner describes the duties of the position in language lifted directly from the *Handbook's* description of market research analysts. The petitioner asserts that its business is "burgeoning" and needs the services of a market research analyst to stay abreast of consumer tastes and compete effectively in a fast-moving industry. The "specialty nature of this position has long been established," the petitioner asserts, citing two 1994 decisions of the AAO.

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.

The occupation of market research analyst is described in the *Handbook*, 2004-05 edition, at 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. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, 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 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. 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.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, not the title of the position. The petitioner must show that the performance demands of the position normally require a degree in a specialty for entry into the occupation. 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 AAO agrees with the director that the evidence of record does not establish that the beneficiary would primarily be performing the duties of a market research analyst in the proffered position. The petitioner has submitted no evidence on appeal to establish that it will employ the beneficiary as a market research analyst for the three-year time period requested in the instant H-1B petition. As stated in the petition, the business has three employees and gross annual income of a little over \$100,000. In the RFE the director asked for the petitioner's organizational chart with a detailed listing of the names, job titles, duties, educational backgrounds, and annual salaries of all employees. In its response the petitioner explained that its staff consisted of contract workers performing "clerical and other non-office related functions." The petitioner provided no further information about these contract workers in response to the RFE, and has submitted no further evidence on appeal to show the nature of the work performed by the contract workers and to address the director's finding that the proffered position primarily involves the duties of a marketing manager. While the *Handbook* indicates that market research analysts may sometimes be employed by manufacturers of consumer goods, the petitioner has submitted no evidence on appeal demonstrating that the beneficiary will be engaged in original market research of the clothing markets in which the petitioner does business. The petitioner has provided few specifics about the types of surveys to be conducted, the types of data to be collected, and the types of analysis to be shared with clients over the telephone in relation to its own business. The petitioner must do more than simply recite the job duties of a market research analyst in the *Handbook*. It must establish how those job duties will be performed in its own business. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)).

Based on the evidence of record, the AAO agrees with the director that duties of the proffered position most closely resemble those of a marketing manager, as described in the *Handbook, id.*, 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.

*Id.* at 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. Many employers give favorable consideration to a broad spectrum of degrees 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).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that they require baccalaureate or higher level knowledge in a specific specialty. Accordingly, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner asserts that the AAO has ruled in two previous decisions that the minimum educational requirement for the position is a bachelor's degree. Neither of those decisions is a precedent decision. Only precedent decisions are binding on all CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). Furthermore, the petitioner has not demonstrated that either position in the two cited cases –

one involved an assistant financial planner and the other a strategic management analyst – is similar to the proffered position in this case. Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the petitioner’s record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Thus, the previous non-precedent decisions of the AAO have no legal bearing on the AAO’s determination of the instant petition.

For the reasons discussed above, the position proffered by the petitioner does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.