

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

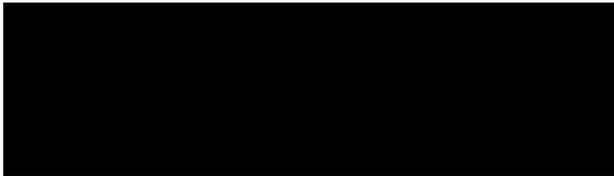
PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave. NW, Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D2



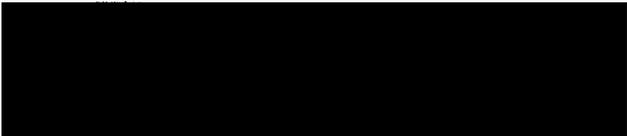
FILE: WAC 03 263 50280 Office: CALIFORNIA SERVICE CENTER

Date: SEP 19 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 company engaged in the development, marketing, and distribution of health and beauty care products. 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 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 a beauty salon operator as well as an importer and distributor of hair and skin care, health care, and health food products. The petitioner stated that it was incorporated in 1998, had 50 employees at the time the instant petition was filed, and was planning to manufacture products in the NAFTA region and open a branch office in Hawaii to expand its business into the Asian-Pacific region. To further its development goals the petitioner indicated that it intended to hire a market research analyst. The duties of the position were described as follows:

Plan and develop marketing strategies for products; research current and potential markets and develop corporate policies [and] procedures regarding market plans; communicate and negotiate with potential distributors in Japan to devise marketing and promotion activities; monitor financial reporting, advise management on market performances and product distribution, and negotiate with buyers and distributors to increase distribution and sales of products.

In response to the RFE the petitioner provided an additional description of the proffered position:

[The beneficiary] will observe [the petitioner's] retail operation, review customer feedback about said operations, interview retail employees about day-to-day operations and gather any suggestions, input they might have [The beneficiary] will evaluate the data and determine if any improvements in the retail operations including employee guidelines, customer interactions and retail procedures can be made. Further, [the beneficiary] will provide invaluable input on promotional events in order to ensure the continued success and spur the growth of our retail operation [The beneficiary] will spend approximately 25% of her time gathering data, 25% of her time analyzing the data, 25% of her time presenting her findings, and 25% of her time implementing her improvements. Also [the beneficiary] will communicate with potential distributors in Japan to develop marketing and promotional activities.

The petitioner stated that the minimum educational requirement for the position is a bachelor's degree in business or a social science. The beneficiary has a bachelor of arts in anthropology from the University of Hawaii at Manoa, granted on December 22, 2002.

In his decision the director determined that the duties of the proffered position reflected those of advertising, marketing, promotions, public relations, and sales managers, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, rather than the duties of a market research analyst. According to the *Handbook*, a baccalaureate level of study is not a normal, industry-wide requirement for entry into that occupation. The record did not show that the petitioner normally required applicants for the position to have a bachelor's degree in the field, the director stated, or that the duties of the position and its level of responsibility indicated complexity and authority beyond that normally encountered in the occupational field. Based on the evidence of record, the director was not persuaded that the proffered position could not be performed by an experienced individual without a baccalaureate level education. 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, Inc. v. Reno, id.*, at 1165-66.

On appeal counsel asserts that the duties of the proffered position, while they may overlap with some duties of an advertising, marketing, promotions, public relations, or sales manager, as discussed in the DOL *Handbook*, involve sophisticated functions to create, administer, and analyze business information – including self-devised surveys and other methods of gathering statistical data – which can only be performed by a market research analyst. The *Handbook* indicates that market research analysts require at least a baccalaureate degree, the petitioner asserts, which makes them a specialty occupation.

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 crucial, 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 duties of the proffered position are actually those of a market research analyst. The job description does not clearly indicate that the beneficiary would be performing typical market research duties such as devising methods and procedures for obtaining needed data, designing surveys, and conducting them by telephone, over the Internet, or in person. The petitioner's description of the proffered position contains only vague references to "review[ing] customer feedback" about the company's retail operation and "evaluating the data" to "determine if any improvements in the retail operations . . . can be made." The research techniques utilized by market research analysts involve more complex tasks than are evident in the duties of the proffered position.

The AAO agrees with the director that the proffered position falls within the *Handbook's* broad occupational category of advertising, marketing, promotions, public relations, and sales managers. Within that occupational category, the AAO determines that the 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 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.

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 or sales 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).

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). 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.