

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



22

FILE: WAC 02 027 57319 Office: CALIFORNIA SERVICE CENTER Date: **AUG 09 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:

SELF-REPRESENTED

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) remanded a subsequent appeal back to the director for entry of a new decision. The director again denied the petition, and the matter is again before the AAO on appeal. The appeal will be dismissed. The petition will be denied

The petitioner is a staffing agency that seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, endeavors to classify the beneficiary 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 basis of his finding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation, originally submitted on October 15, 2001; (2) the director's first request for additional evidence, dated January 18, 2002; (3) the petitioner's April 15, 2002 response to the director's request; (4) the director's first denial letter, dated August 21, 2002; (5) the first Form I-290B and supporting documentation, dated September 18, 2002; (6) the AAO's February 20, 2004 remand of the petition to the director for entry of a new decision; (7) the director's second request for additional evidence, dated April 1, 2004; (8) the petitioner's June 14, 2004 response to the director's request; (9) the director's second denial letter, dated January 29, 2005; and (10) the second Form I-290B and supporting documentation, dated February 25, 2005. The AAO reviewed the record in its entirety before issuing its decision.

The sole issue presented on appeal is whether the petitioner's proposed position qualifies for classification as a specialty occupation.

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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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 proposed position.

In its June 14, 2004 response to the director’s request for additional evidence, the petitioner stated that the duties of the proposed position would consist of developing analytical tools to track sales volume by group and product category; tracking statistical marketing and logistics data for business accounts; providing projection tools for annual forecasts and projections; providing profitability analysis of sales volumes; and establishing sales projections and profit margins by product category.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In his January 29, 2005 denial, the director, relying on the 2004-2005 edition of the *Handbook*, found that many of the duties of the proposed position reflect the employment of a market research analyst, but concluded that the record failed to establish that the petitioner’s business was of the type or complexity to require a market research analyst. While, as discussed below, the AAO concurs in the director’s ultimate finding that the proposed position is not a specialty occupation, it does not agree with the reasoning that led him to his conclusion.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity or operate the type of business that would require a market research analyst. As discussed below, the AAO concurs in the director’s finding that the proposed position is not that of a market research analyst.¹ However, it finds the director to have misjudged the scope of the petitioner’s

¹ The AAO notes that the petitioner does not dispute the director’s characterization of the duties of the proposed position as more akin to those of a marketing manager than to those of a market research analyst.

business when he concluded that it did not have the consumer base to require the services of a marketing or sales staff. The AAO also disagrees with the director's statement that the petitioner's business is not sufficiently complex to require the services of a market research analyst. The *Handbook* indicates that the work of market research analysts is applicable to many industries and that they are employed throughout the economy. In that market researchers are concerned with the potential sales of products or services and provide a company's management with the information needed to make decisions on the promotion, distribution, design and pricing of products or services, the petitioner's need for marketing research may not be discounted based on a lack of organizational complexity or its type of business. The fact that the petitioner is a staffing agency does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of identifying business opportunities. Therefore, the AAO withdraws the director's findings in this regard.

In reaching its own conclusions regarding the nature of the proposed position, the AAO has reviewed the discussion of market or marketing research analysts at pages 173-174 of the 2006-2007 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

[M]arket 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 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.

The AAO finds that it is market research analysts' work in the design and analysis of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicated that the beneficiary would develop analytical tools to track the petitioner's sales volume, such market research responsibilities would not make the beneficiary a market research analyst.

The issue is not whether the proposed position requires the beneficiary to do any market research, which it likely does, but whether it is that of a market research analyst and requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through a master's degree in business administration, marketing, statistics, communications, or other related field. (*Handbook* at page 174). As the petitioner does not indicate that the proposed position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, or to evaluate this type of research, the position does not reflect the work of a market research analyst.

Instead, like the director, the AAO finds the market research duties associated with the proposed position to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies.

The *Handbook's* discussion of the duties of advertising, marketing, promotions, public relations, and sales managers states the following:

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they 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. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

The *Handbook* states the following with regard to the educational qualifications required for marketing managers:

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. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. . . .

Most advertising, marketing, promotions, public relations, and sales 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, advertising, promotions, or public relations specialists. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires a showing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. The *Handbook* indicates that most marketing manager positions are filled on the basis of experience (most positions “are filled by promoting experienced staff or related professional personnel”). Moreover, the fact that some employers “prefer” a degree or that individuals possessing degrees “should have the best job opportunities” does not rise to this criterion's standard of employers normally requiring at least a

bachelor's degree or its equivalent in a specific specialty. As such, marketing managers do not qualify as specialty occupations under the first criterion.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by the petitioner. The petitioner, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement is common in the petitioner's industry in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

There is no evidence in the record to demonstrate that any of the companies that issued the postings are similar to the petitioner in size, scope, or scale of operations. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

The DBSI Group of Companies are, according to their advertisement, a group of privately-held companies involved in diversified business and real estate ownership and management. Futurestep, Inc. is a health care and medical products company, AAA Auto Club South provides travel-related services for its members, School-Link Technologies is a software company, and CyberCoders is a pharmaceutical company. The unnamed company advertising its vacancy through Careerbuilder.com directly is an asset management firm.

Moreover, these postings do not establish that a degree in a specific specialty is required for this position. As noted previously, 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 proposed position. The companies from whom the petitioner has submitted advertisements would find acceptable degrees in, among other areas, business, business administration, marketing, market research, advertising, economics, psychology, or library science. Several of the advertisements did not list any degree fields; a degree in *any* field would be acceptable.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

The petitioner's June 14, 2004 response to the director's request for additional evidence stated that the petitioner has previously employed three individuals with bachelor's degrees as market research analysts. However, no evidence to support this assertion was presented. Again, simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Moreover, the petitioner did not even state whether those individuals held the same type of degree as the beneficiary in this case.

Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of marketing manager positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Accordingly, the proposed position does not qualify for classification as a specialty occupation, and the petition was properly denied.

The AAO notes that even if it had classified the proposed position as that of a market research analyst, the position would still not qualify for classification as a specialty occupation.

The *Handbook* states the following with regard to the educational qualifications necessary for entry into this field:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions, and increases opportunities for advancement to more responsible positions. Also, continuing education is important in order to keep current with the latest methods of developing, conducting, and analyzing surveys and other data. Market and survey researchers may earn advanced degrees in business administration, marketing, statistics, communications, or some closely related discipline. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Many corporation and government executives have a strong background in marketing.

As the *Handbook* finds that market research analyst positions impose no specific degree requirement on individuals seeking employment in the field, the petitioner cannot establish that its proposed market research analyst position requires the beneficiary to hold a baccalaureate or higher degree, or its equivalent, in a specific specialty. When a range of degrees, e.g., the liberal arts, or a degree of generalized

title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study.

Finally, the petitioner asserts that the director's decision is inconsistent with previous petitions it has submitted for similar positions. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by the petitioner are not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition.

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 record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proposed position or were approved in error, no such determination may be made without review of the original records in their entirety. However, if the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of those petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.