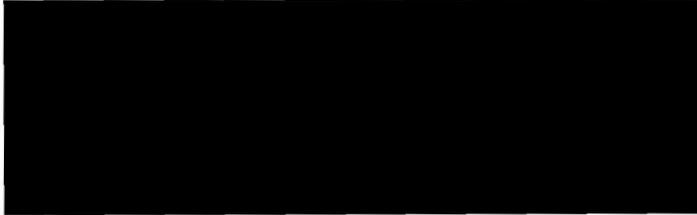




U.S. Citizenship
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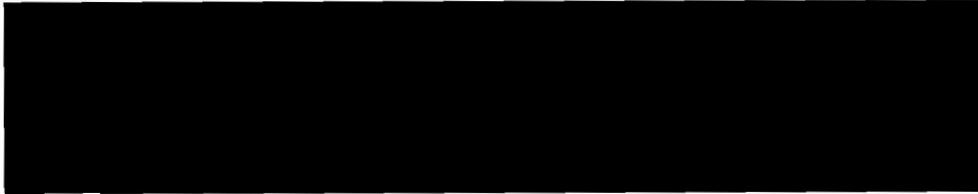
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FILE: WAC 03 155 50450 Office: CALIFORNIA SERVICE CENTER Date: APR 03 2006

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

for *Michael T. Kelly*
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a commercial insurance broker that seeks to employ the beneficiary as a business development officer. 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 that the petitioner had failed to prove that the proposed position qualifies for classification as a specialty occupation. In his denial, the director likened the duties of the proposed position to those of a marketing manager.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

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 April 4, 2003 letter of support, the petitioner stated that the duties of the proposed position would consist of conducting a market study to identify the commercial insurance preferences of Asian business owners in California; developing and implementing a business plan that will highlight niche marketing strategies, focusing on the Asian- and Filipino-American market; installing a lead-referral program that will allow the petitioner to penetrate the Asian- and Filipino-American-owned commercial enterprise market; developing and implementing the training program for the petitioner’s producers so as to effectively carry out the niche marketing program; managing the profitability of the petitioner’s niche marketing strategy/operation; and expanding the niche market development strategy to other lines of business in the petitioner’s group of businesses.

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 response to the director’s request for evidence, previous counsel contended that the duties of the proposed position combine those of management analysts and market research analysts, as those positions are described in the *Handbook*. The director rejected this characterization, finding that the duties of the proposed position were similar to those of marketing managers.

On appeal, newly-retained counsel also contends that the duties of the proposed position combine those of management analysts and market research analysts.

In his denial, the director, relying on the 2004-2005 edition of the *Handbook*, found that some 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 duties of the proposed position are analogous to those of marketing managers, and that the position is therefore 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 marketing 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 commercial insurance broker 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.

As noted previously, counsel contends that the duties of the proposed position merge those of market research analysts and management analysts, as those positions are described in the *Handbook*. The 2006-2007 edition of the *Handbook* states the following with regard to the employment of market research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze statistical data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussion, 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 and evaluating the data, market research analysts 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 also may 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.

As a whole, the *Handbook's* information on market research analysts conveys that their work is characterized by the design and implementation of data-collection methodologies, data collection, and precise data analysis, at a level of expertise that most often requires a bachelor's degree. The *Handbook* also states that market research analysts "must spend long hours on independent study and problem solving."

The employment of market research analysts is characterized by their responsibility for designing and conducting the research they need to predict future sales of a product or service. According to the petitioner's response to the director's request for evidence, ten percent of the beneficiary's time would be spent on market research. The petitioner's language, which states that the beneficiary will "conduct market study" suggests that only one market survey will be conducted.

According to the *Handbook*, elements of market research are included in the duties of a marketing manager. As discussed further below, the AAO finds that the duties of position, including the few market research duties, are included in the category of marketing managers.

Nor are the duties of the proposed position analogous to those of management analysts.

The 2006-2007 edition of the *Handbook* sets forth the following description of the duties of a management analyst:

Management analysts, often referred to as *management consultants* in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. For example, a small but rapidly growing company that needs help improving the system of control over inventories and expenses may decide to employ a consultant who is an expert in just-in-time inventory management. In another case, a large company that has recently acquired a new division may hire management analysts to help reorganize the corporate structure and eliminate duplicate or nonessential jobs. In recent years, information technology and electronic commerce have proved new opportunities for management analysts. Companies hire consultants to develop strategies for entering and remaining competitive in the new electronic marketplace

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data—which may include annual revenues, employment, or expenditures—and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem. While preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture. Insight into the problem often is gained by building and solving mathematical models.

Once they have decided on a course of action, consultants report their findings and recommendations to the client. These suggestions usually are submitted in writing, but oral presentations regarding findings also are common. For some projects, management analysts are retained to help implement the suggestions they have made.

The *Handbook* reveals that the proposed duties do not rise to the level of a management analyst, an occupation that normally qualifies as a specialty occupation. According to the *Handbook*, management analysts, often referred to as management consultants in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. The *Handbook* reports that analysts and consultants collect, review, and analyze information in order to make recommendations to managers. They define the nature and extent of problems; analyze relevant data, which may include annual revenues, employment, or expenditures; interview managers and employees while observing their operations; and develop solutions to problems. Once a course of action is decided, consultants report their findings and recommendations to the client, and for some projects, consultants are retained to help implement their suggestions. According to the *Handbook*, firms providing management analysts vary in size from a single practitioner to a large international organization employing thousands of consultants.

The beneficiary, on the other hand, would conduct a market study, develop and implement a business plan, install and manage a lead referral program, develop and implement a training program for producers, manage the profitability of the petitioner's niche marketing project, and expand the niche market development strategy. These duties do not describe the duties of a management analyst, as that occupation is described in the *Handbook*.

The AAO agrees with the director that the duties of the proposed position substantially mirror those of marketing of managers. 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 . . . 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 AAO notes that, on appeal, counsel does not rebut the director's finding that the duties of the proposed position are similar to those of marketing managers. Rather, he reiterates information from the *Handbook* regarding the educational qualifications for market research analysts and management analysts.

However, as noted *supra*, the AAO agrees with the director that the duties of the proposed position substantially mirror those of marketing of managers and will adjudicate the petitioner accordingly. As such, the AAO next turns to the *Handbook's* discussion of the educational qualifications necessary for entry into the field of marketing management.

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 counsel. Counsel, 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. Contrary to counsel’s assertions otherwise, in order to meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

There is no evidence in the record to demonstrate that any of these postings come from companies similar in size or scope of business operations to the petitioner, a commercial insurance broker with ten employees. According to their postings, Virtual Iris Studios is an internet/e-commerce company, Biosite is a biotechnology and pharmaceutical company, Bell Tech Logix is an information technology company, Velocitel is a telecommunications company, and Overture is an internet commercial search service (wholly owned by Yahoo!). No information has been submitted that would demonstrate that these companies are “similar” to the petitioner as required by the regulation.

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of marketing managers as discussed in the *Handbook*, which do not require a degree. The record contains no documentation to support a finding that the proposed position is so complex or unique that, in contrast to many marketing positions with no degree requirement, it can only be performed by an individual with at least a bachelor’s degree, or its equivalent, in a specific specialty.

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either 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 the 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.

On appeal, counsel claims that the proposed position qualifies under this criterion. However, counsel also concedes that this is a newly-created position. If the petitioner has never hired anyone for this position, then it cannot demonstrate a normal practice of hiring someone with a bachelor’s degree or its equivalent for this position. 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).

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.