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U.S. Citizenship  
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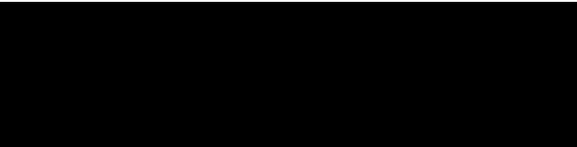
FILE: EAC 03 190 52009 Office: VERMONT SERVICE CENTER Date: JAN 13 2006

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 documents 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 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 holding company that seeks to employ the beneficiary as a marketing/business analyst for its e-commerce interests 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 basis that the position is not a specialty occupation. The director granted the petitioner's motion to reopen (MTR) then affirmed its previous denial of the petition.

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.

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 bachelor's or higher degree, but one in a specific field of study that is directly related to the proposed position.

The record of proceeding before the AAO contains, in part: (1) Form I-129 with supporting documents; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE including a detailed business plan for the proposed company; (4) the director's denial letter; (5) the petitioner's MTR with supporting documents; (6) the director's affirmation of the previous denial; and (7) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner lists the proposed position as a marketing/business analyst. Evidence of the beneficiary's duties includes the Form I-129 with attachments, the response to the RFE, and additional evidence submitted with the MTR. According to this evidence, the beneficiary's duties would include:

- **Designing promotional programs:** designing promotional programs for the four major seasons of retail buying to develop and increase public awareness of the petitioner's product lines; generating press releases to coincide with trade shows; scheduling and organizing open house visits for buyers at the petitioner's showroom during these times; and managing over 12 shows per year including Accessories, Femme, National Merchandising and Premiums, and National Gift Show. (5 to 7 days per show);
- **Marketing development:** contacting magazines and other advertising venues to market products and merchandise; initiating, designing, and preparing a marketing kit to include names and titles of editors of accessories of magazines, such as Lucky, Ladies Home Journal, and Real Simple, merchandising buyers from department and specialty stores, wholesalers, boutiques, and other retail chain owners; working with the petitioner's director of merchandising and operations to select appropriate merchandise to showcase and promote for that buying season; canvassing relevant buyers from the on-line Super pager listings to increase the e-mail addresses of potential customers for the company's mailing list; and following-up with all these marketing contacts. (3 to 4 hours a day);
- **Designing marketing programs:** performing Internet research on accessories markets, color trends, product knowledge, competitive pricing and product sourcing; organizing, developing, and designing a comprehensive customers/products program to track preferences, purchases, and contact information for future market and customer analysis; developing marketing programs for market segmentation, niche marketing, and special timely promotion activities; providing an easily accessible database to serve e-shoppers faster and better and to enhance the petitioner's understanding of its customers' needs; and using Outlook and Andale to collect and track the e-mail addresses of current, new, and potential customers by categories. (2 hours a day).
- **Tracking of profit and loss:** developing and tracking the pricing, cost, and profitability of each of the company's products using Quickbook; inputting daily and summarizing monthly the tracking of profit and loss;
- **Developing e-mail marketing campaigns:** initiating, designing, and mailing out the marketing campaign e-mail by coordinating and inputting the appropriate product photos into the Internet draft; writing copy and selecting different colors for the background, and having a draft ready for review. On approval, forwarding thousands of e-mails to existing and new customers. (5 to 7 hours per week);
- **Developing and updating e-commerce site:** inputting new products into the website; developing and updating the e-commerce site in order to keep customers interested and to generate repeat business; writing up brief detailed descriptions of each product to entice interest; based on product cost, pricing the item appropriately and then inputting the data using HTML by category; updating the web cover page to promote different products or to tie in with special occasion promotion campaigns. (At least 1 hour a day);

- **Developing partnerships with U.S. companies:** developing a strategic partnership with other companies for consignment and drop ship arrangements; developing and using detailed marketing analysis from the company's internal customer sales data, attendance at annual trade shows, and research to create a comprehensive database and wholesale marketing kit with product brochure and pricing arrangements to call on potential vendors for possible partnership. This will include cold calls on small wholesale merchants in the accessories market and traditional brick and mortar suppliers that do not have an e-commerce presence. (Half an hour a day).
- **Developing partnerships with vendors and suppliers in China,** the company's main supply source.

In the request for evidence, the director asked the petitioner to provide a more detailed job description with percentage of time to be spent on each duty and evidence that the proposed position met at least one of the criteria of a specialty occupation.

In response, the petitioner submitted a more detailed job description that specified the amount of time the beneficiary would spend on each duty, the entry for market research analysts in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the *ONet* summary for market research analysts, a position evaluation from [REDACTED] and a detailed business plan for the proposed company.

The director found that, based on the size, scope, and focus of the petitioner's business, the beneficiary would not be performing the typical duties of a market research analyst and that the proposed position was not a specialty occupation.

Upon review of the record, the AAO finds that the petitioner has not established any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

To determine whether a 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 bachelor's degree in a specific field of study as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Based on the petitioner's description and a thorough review of the *Handbook*, the AAO finds that the proposed position can be more precisely categorized as a product development manager or market research manager, rather than a market research analyst. According to the *Handbook*, product development and market research managers are the subordinates of marketing managers. The proposed position is not a market research analyst because market research analysts, or marketing surveyors, design and develop surveys to assess consumer preference. They direct trained interviewers who conduct the actual surveys, then analyze the survey results for their clients. None of the proposed duties involves the creation and oversight of market surveys.

The duties described for the proposed position more closely resemble the duties of product development managers and market research managers. Together with marketing managers, these individuals identify potential markets and work with advertising and promotion managers to promote the firm's products and services and to attract potential users. These duties mirror the duties listed for the proposed position, such

as “designing promotional programs,” “contacting magazines to market products,” and “performing internet research on accessories markets.”

To determine if the proposed position qualifies as a specialty occupation under the first criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) – a bachelor’s or higher degree or its equivalent, in a specific field of study is normally the minimum requirement for entry into the particular position – the AAO turns to the *Handbook*’s discussion of the educational requirements for marketing managers. Regarding the educational requirements for those in this field, the *Handbook* notes that:

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.

The *Handbook* clearly indicates that jobs in this field do not require a specific bachelor’s degree for entry into the field. Employers consider those with liberal arts degrees and relevant work experience suitable for jobs in this area. Employers prefer, but do not require, marketing managers to possess bachelor’s degrees in specific fields of study. As no specific course of study is required for these occupations, the petitioner fails to establish that a bachelor’s or higher degree in a specific field of study is the normal minimum requirement for entry into the proposed marketing manager position.

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies “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*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). The petitioner did not provide any evidence that the requirement of a bachelor’s degree in a business-related field is common in the e-commerce industry in parallel positions among companies of similar focus and size. Therefore, the proposed position does not qualify as a specialty occupation under the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor’s degree or its equivalent, in a specific field of study, for the position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner’s past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, the petitioner has not submitted evidence to establish its normal hiring practices for the proposed position. In the absence of an employment history for the position, the petitioner has not established that its position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position – the second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The AAO agrees with counsel that the director incorrectly denied the petition based on the size of the company but disagrees that the complexity of these particular duties makes the position a specialty occupation. To support the assertion that the complexity of the duties is what makes the position a specialty occupation, the petitioner provided an opinion letter from [REDACTED] a professor at Pace University's Lubin Graduate School of Business. His curriculum vitae and a letter from the Associate Dean of the Lubin School of Business, certifying that Professor [REDACTED] has the authority to grant academic credit for marketing experience, accompany Professor [REDACTED] letter. Professor [REDACTED] asserts, "generalized knowledge of marketing or business administration alone is not sufficient ... to successfully meet the function requirements [of the proposed position]." He further asserts that a business-related bachelor's degree enables the beneficiary to "assess complex issues pertaining to the predominant characteristics of specific industry segments and the pricing structures of competing firms and to utilize his or her conclusions in developing effective marketing campaigns and establishing specifications for products."

The AAO gives weight to [REDACTED] opinion as it relates to the beneficiary's ability to perform the proposed duties. [REDACTED] credentials, in this respect, are documented by the fact that he writes on Pace University letterhead and by the letter from the Associate Dean of the Lubin School of Business. The AAO cannot, however, give significant weight to [REDACTED] expertise in assigning a higher level of complexity to the duties of the proposed position. The proposed duties do not appear more complex or specialized than the duties of a typical product development or market research manager, occupations that do not require bachelor's degrees specifically in marketing. The *Handbook*, which is a compilation of research conducted through surveys, questionnaires, personal interviews, and other occupational data, obtained nationwide, indicates that a market research or product development manager such as the type described by the petitioner, may obtain employment with a variety of educational backgrounds, or without a bachelor's degree. [REDACTED] asserts that the duties are complex and specialized and that he has worked as an associate at a promotional products company and as owner of a consulting firm but does not provide documentation to support his experience. He cites no market surveys on other industry data to support his conclusion that a bachelor's degree in a specialty is required for the position. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

No evidence contained in the record demonstrates that the proposed position is a specialty occupation.

The burden of proving eligibility for the benefit sought remains entirely 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.