

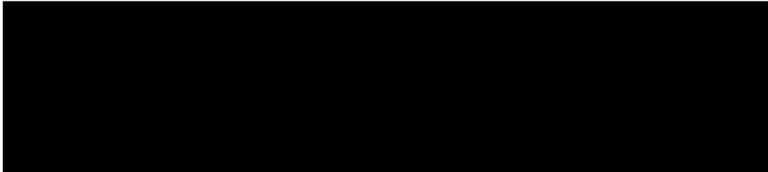


U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

D2



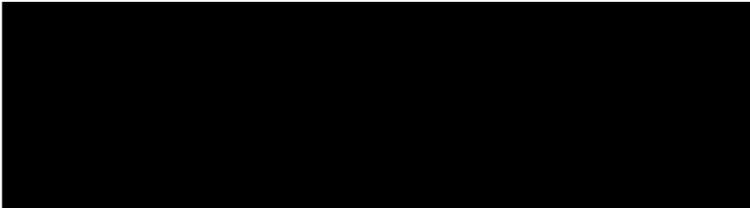
FILE: SRC 04 248 53513 Office: TEXAS SERVICE CENTER Date: JUN 06 2006

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the service center 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 an investment company that seeks to employ the beneficiary as a business development 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 because the proffered position is not a specialty occupation. Counsel submits a timely appeal.

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 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 additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B, the appeal, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business development analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing the petitioner's long-term strategic plan; overseeing policy development with regard to marketing the salon's services; assisting in seeking new markets and businesses for investment; pursuing opportunities through networking at business events; maintaining existing and establishing new relationships/partnerships with area businesses; investigating the possibility of acquiring new locations; targeting corporations, universities, hospitals, etc. to market the salon's services; collecting, reviewing, and analyzing information in order to make recommendations to management; garnering promotional opportunities (print, radio, etc.) on behalf of the salon. For the proposed position, the petitioner asserts that it requires a bachelor's degree or its equivalent with a major in marketing, management, or a related field.

The director stated that the petitioner, which conducts the acquisition and management of businesses, has the same business location as the Captivating Beauty Center, a company that the petitioner acquired. The director stated that no documents reflect that the petitioner is an investment company: the submitted documentation indicates that the petitioner owns one beauty salon and conducts business as the Captivating Beauty Center. The director stated that the beneficiary's job duties indicate that he will work as a business development analyst for the beauty salon; however, she questioned whether the beneficiary would actually perform specialty occupation duties given that the beauty center already employs a president, vice-president, and an operations manager. The director found that the proposed position involved general managerial duties, and that the beneficiary's duties are not those of an analyst. According to the director, the offered position does not primarily entail the development of businesses. In considering the job duties in the context of the petitioner's business, the director concluded that the petitioner's sole investment is the management of the beauty center, which was purchased from the petitioner's operations manager. According to the director, the purchase of beauty salons would not require the services of a business development analyst.

On appeal, counsel states that the director's request for evidence did not seek evidence of or raise the issue of whether the offered position is a specialty occupation. Thus, counsel requests reopening the case to afford the petitioner the opportunity to establish the offered position as a specialty occupation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel contends on appeal that the director should have requested evidence that directly pertains to whether the offered position qualifies as a specialty occupation. Counsel's contention is not persuasive. The regulation at 8 C.F.R. 103.2(b)(12) indicates that a petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed. The AAO finds that the director's request for evidence sought information that helped to further delineate the proposed duties in the context of the petitioner's business

operations. The AAO notes that based on the petitioner's response, the director was able to conclude that in the context of the petitioner's business operations, the proposed duties would not qualify as those of a specialty occupation. Moreover, the petitioner has in fact had an opportunity to supplement the record on appeal in order to establish that the proposed duties are those of a specialty occupation. Therefore, it would serve no useful purpose to remand the case simply to afford the petitioner the opportunity to supplement the record with new evidence.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the 2006-2007 edition of the *Handbook* reports that the industry requires a degree; 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*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In determining 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 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 the duties and educational requirements of certain occupations.

Although the petitioner states that it is involved in investing, acquiring, purchasing, and managing businesses, the director is correct in finding that the evidence of record does not establish that the petitioner actively engages in acquiring and purchasing businesses.

The AAO finds that in the context of the petitioner's business operations, the proposed duties reflect those of a marketing manager and a marketing research analyst as those occupations are depicted in the *Handbook*. The *Handbook* describes a marketing manager as follows:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate 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 to help firms maximize profits and market share 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 they 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 beneficiary's duties of developing the petitioner's long-term strategic plan; overseeing policy development with regard to marketing the salon's services; assisting in seeking new markets and businesses for investment; pursuing opportunities through networking at business events; maintaining and establishing relationships/partnerships with area businesses; targeting corporations, universities, hospitals, etc. to market the salon's services; investigating the acquisition of new locations; collecting, reviewing, and analyzing information in order to make recommendations to management; and garnering promotional opportunities (print, radio, etc.) on behalf of the salon are all encompassed within the description of a marketing manager. For example, the *Handbook* states that marketing managers "develop the firm's marketing strategy"; "estimate the demand for products and services"; "identify potential markets"; "monitor trends that indicate the need for new products and services," and "promote the firm's products and services and to attract potential users."

The *Handbook* indicates that a bachelor's degree in a specific specialty is not required for a marketing manager. It states:

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.

A marketing research analyst is described in the *Handbook* as follows:

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 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 discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of 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 also might develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The beneficiary will investigate the possibility of acquiring new locations and assist in seeking new businesses for investment. These duties are encompassed within those of a marketing research analyst as they parallel the marketing research analyst's duty to provide a company's management with information needed to determine the advisability of "opening new branches, or otherwise diversifying the company's operations."

The *Handbook* indicates that a marketing research analyst is not required to possess a bachelor's degree *in a specific specialty*. It states that "[a] bachelor's degree is the minimum educational requirement for many market and survey research jobs."

According to counsel, the H-1B approval notice in the record relates to a strategic planning manager position. Counsel states that the duties of the strategic planning manager will be assumed by the beneficiary; thus, the proposed position qualifies as a specialty occupation. This record of proceeding does not contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the approval notice submitted by counsel is not sufficient to enable the AAO to determine whether the position offered in the prior case was 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 case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition 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).

The AAO's conclusion, based on the evidence of record, is that the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which is that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree. As discussed earlier in this decision, the duties of the proposed position resemble those of a marketing manager and a marketing research analyst, which are occupations that the *Handbook*

reveals do not require a baccalaureate degree in a specific academic specialty. Thus, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As discussed in this decision under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), the position offered here resembles that of a marketing manager and a marketing research analyst, which are occupations that the *Handbook* reports do not require a bachelor's degree in a specific specialty. Collectively, the evidence of record which consists of the financial records, information from the Florida Department of State, lease agreements, information relating to Captivating Beauty Center, the list of employees, and the business for sale listing fail to indicate that the proposed position is so specialized and complex that the knowledge required to perform its duties is usually associated with a baccalaureate degree in a specific specialty.

Accordingly, the petitioner fails to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.