

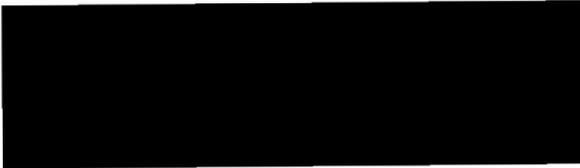
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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JUL 17 2006

FILE: WAC 04 067 50575 Office: CALIFORNIA SERVICE CENTER Date:

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 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 health care products provider that 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 basis that the petitioner did not establish that the proposed position is a specialty occupation. On appeal, counsel submits a brief.

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: (1) Form I-129 with supporting documents; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; (5) the petitioner's motion to reopen (MTR); (6) the director's dismissal of the MTR and (7) the Form I-290B with brief and additional documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner lists the proposed position as a market research analyst. Evidence of the beneficiary's duties includes the Form I-129 with accompanying support letter, the response to the RFE, and the petitioner's brief

on appeal. According to this evidence, the beneficiary's duties would include: researching and developing demographic profiles of persons requiring personalized home healthcare services and medical facilities requiring quality products that suit the needs of the persons they are caring for; developing marketing plans to sell prescription medications, home care equipment, respiratory products and services, diabetic care products, IV therapy equipment, enteral nutrition supplies, wound care supplies, prosthetics, incontinence supplies, urinary care products, and ostomy supplies; developing plans to participate in trade shows, expositions, and other group gatherings to sell products; providing research and information on the competition regarding pricing, service, and product positioning; ensuring pricing and quotes comport with profession standards; following through to ensure good customer service by taking a pro-active interest in preventing and solving problems associated with rates. The petitioner stated that the position required a bachelor of arts degree, no previous work experience, and that several educational backgrounds and majors were well-suited for the position, as it combined marketing, business analysis, and detail-oriented written and verbal communication skills.

The director found that the petitioner failed to establish that it was engaged in the type of business that typically required a full- or part-time market research analyst. The director found that the petitioner did not have the organizational complexity to justify hiring a market research analyst for a significant length of time. The director found that since the petitioner did not have an advertising, marketing, or sales staff, that the beneficiary would end up performing those duties. The director also found that, while some of the position required some market analysis, the duties were more similar to those of a marketing manager. Finally, the director found that the petitioner's marketing manager position did not qualify as a specialty occupation.

On appeal, counsel asserts that the proposed position is that of a market research analyst and that it is a specialty occupation.

The petitioner need only satisfy one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to establish that a position is a specialty occupation. Upon a thorough review of the record, the AAO concludes that the petitioner has failed to establish that the proposed position meets 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.

As a preliminary matter, the AAO finds the director to have erred in concluding that the petitioner is not engaged in the type of business that would require a market research analyst. In that the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that the work of marketing research analysts is concerned with the potential sales of products or services and that they provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services, market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner is engaged in providing health care products does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of increasing its business opportunities and earnings. Accordingly, the AAO withdraws the director's finding in this regard.

Nevertheless, no evidence contained in the record demonstrates that the proposed position is 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 concurs with the director that the description of the proposed position more closely reflects the duties of marketing managers, who, according to the *Handbook*, estimate the demand for products and services offered by the firm and its competitors and identify potential markets; and reflect less those of market research analysts, who design and develop surveys to assess consumer preference. Market research analysts 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 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 "developing plans to participate in trade shows, expositions, and other group gatherings to sell products" and "providing research and information on the competition regarding pricing, service, and product positioning; ensuring pricing and quotes comport with profession standards."

The AAO finds that the petitioner has not established that the proposed position is a specialty occupation.

The petitioner has failed to establish that the position is one that qualifies as a specialty occupation under the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(1), 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. To determine whether the proposed position is a specialty occupation under this criterion, the AAO turns to the *Handbook's* discussion of the educational requirements for marketing managers. The *Handbook* indicates that employers often require bachelor's degrees for marketing managers but not in any specific specialty. Thus, the petitioner has failed to establish that a bachelor's degree or its equivalent, in a specific field of study, is normally the minimum requirement for entry into the proposed position.

The AAO turns next to the first alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - 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 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 job announcements the petitioner submitted are not sufficient to establish an industry-wide specialized bachelor's degree requirement for parallel positions among health products providers. The job announcements are distinct from the instant position in several significant ways and either do not describe the duties with sufficient particularity to determine if they are similar to the proposed position, or are from companies dissimilar to the petitioner, a healthcare products provider with about 17 employees. The petitioner has not established that the degree requirement is common to the industry in parallel position among similar organizations. 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 submitted no evidence to establish its normal hiring practices for this particular position. In the absence of an employment history for the proposed position, the petitioner cannot establish that its proposed 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 and uniqueness of the proposed position and the specialized nature and complexity of the proposed duties. A petitioner satisfies the second alternative prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) if it establishes that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific field of study. The petitioner submitted a list of the job duties for the proposed position but provided no further detail as to the unique or complex nature of the proposed position. This list is not sufficient to establish that the proposed position is unique compared with other similar marketing manager positions within the same industry. 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 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