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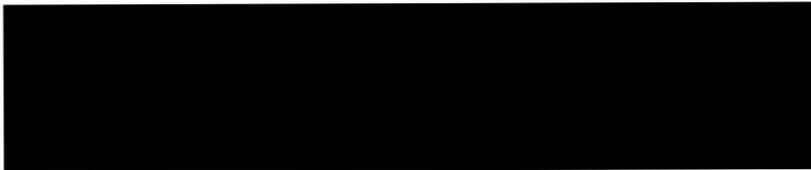
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FILE: EAC 04 174 50205 Office: VERMONT SERVICE CENTER Date: MAR 27 2006

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 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 a cargo forwarding and courier service that seeks to employ the beneficiary as a strategic management/marketing 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 ground that: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified for a specialty occupation.

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 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 strategic management/marketing analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's support letter. According to this evidence, the beneficiary would perform duties that entail: creating and overseeing campaigns to increase cargo and courier services and retail business within minority populations in the region, specifically the Asian population; researching market conditions such as delivery and cargo preferences of customers; gathering data on shipping/cargo establishments and analyzing their pricing, delivery plan, advertising techniques and marketing methods; analyzing business and operating procedures to manage and deliver work; organizing and documenting findings of studies and preparing recommendations for implementing new systems, procedures, or organizational changes; installing new systems and training personnel in applications; conferring with personnel about newly implemented systems or procedures; designing phone and mail interview surveys and questionnaires to assess customer/client preferences; developing networking strategies that focus on targeted communities such as shipping job fairs and cargo handling activities; preparing periodic assessments of the marketing strategy and recommending alternatives that increase the delivery/courier business and expand business among targeted communities; conducting periodic statistical analysis to assess growth and the possibility of establishing branches in other locations, including the feasibility of adding new delivery products/services; analyzing the petitioner's performance against the shipping/cargo industry standard and developing strategies and programs that meet or exceed the industry average; and submitting periodic reports to the owner/president regarding developments on marketing and management plans. For the proposed position the petitioner requires a bachelor's degree in management, marketing, commerce, or a related field.

The director found that the proposed duties are a combination of those of a market research analyst and a management analyst as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*). The director stated that the *Handbook* discloses that those occupations typically are found in consulting firms or are held by individual consultants. The director concluded that in light of the size and scope of the petitioner's business, the beneficiary would not be "fully and solely occupied with the duties of a specialty occupation." The director also concluded that based on the *Handbook's* information, the beneficiary is unqualified for a market research analyst or a management analyst position.

On appeal, counsel states that the director erred by denying the petition without issuing a request for additional evidence and for failing to elaborate on the grounds for the denial. Counsel states that there is no regulatory requirement that a beneficiary must have experience in order to qualify for 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 violated 8 C.F.R. § 103.2(b)(8) by failing to request further evidence before denying the petition. The cited regulation requires the director to request additional evidence in instances "where there is no evidence of ineligibility, and initial evidence or eligibility information is

missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the petition based on insufficient evidence of eligibility. Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself. The petitioner has in fact supplemented the record on appeal, and 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 first 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 *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)).

The AAO does not agree with the director's statement that the size and scope of the petitioner's business determines the beneficiary's duties, and that the employment of market research analysts and management analysts is limited to particular industries. The *Handbook* discloses that management analysts are found in a wide range of industries and are employed in small companies, and that market research analysts are employed throughout the economy. Notwithstanding the *Handbook's* information, the AAO finds that the proposed duties are not those of a market research analyst or a management analyst, or a combination of both occupations.

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 *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* describes a management analyst as follows:

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* relays that a management analyst defines the nature and extent of problems, reports findings and recommendations, and sometimes implements suggestions.

The AAO finds that the petitioner has not established that the proposed duties reflect those of a management analyst, which is a specialty occupation. As described by the petitioner, the proposed duties are portrayed in general terms, without any particularity, such that the duties do not relate to the petitioner's business, a cargo forwarding and courier service, or to any specifically defined problems. For example, the beneficiary is described as analyzing business or operating procedures in order to devise efficient methods to manage and deliver work. However, the petitioner fails to describe its current business and operating procedures, the methods it uses to manage and deliver work, and the particular problems it experiences in those areas. The petitioner does not describe in any manner the "new systems" that will be installed and does not elaborate on the types or standards of "performance" that will be analyzed and compared within the shipping/cargo industry. To determine whether a position qualifies as a specialty occupation, CIS must examine the actual employment of a beneficiary, which are the specific tasks to be performed by the beneficiary. In light of the generic job description offered here, and in the absence of a narration of specific business and operational problems, the AAO cannot identify the beneficiary's specific tasks, and thereby, whether the position is that of a management analyst. In addition, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation.

For the proposed position, the petitioner requires a bachelor's degree in management, marketing, commerce, or a related field. With respect to the employment of a management analyst, the *Handbook* states:

Educational requirements for entry-level jobs in this field vary widely between private industry and government. Most employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. Some employers also require additional years of experience in the field or industry in which the worker plans to consult, in addition to a master's degree. Some will hire workers with a bachelor's degree as a research analyst or associate. Research analysts usually need to pursue a master's degree in order to advance to a consulting position. Most government agencies hire people with a bachelor's degree and no pertinent work experience for entry-level management analyst positions.

The AAO considers the *Handbook's* passage to indicate that in private industry a master's degree or its equivalent in business administration or a related discipline is normally the minimum educational requirement for entry into a management analyst position. Although the *Handbook* conveys that some employers hire workers with a baccalaureate degree as a research analyst or associate, no evidence in the record indicates the proposed position parallels a research analyst or associate; nor has the petitioner made such an assertion. Thus, the petitioner's educational requirement for the proposed position differs from the *Handbook's* requirement of a master's degree or its equivalent in business administration or a related discipline for a management analyst position.

The petitioner asserts that some of the proposed duties are those of a marketing analyst. The *Handbook* describes a marketing analyst 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.

According to the *Handbook*, the primary role of a market research analyst is to "devise methods and procedures for obtaining the data they need." Although the beneficiary will design phone and mail interview surveys and questionnaires, the petitioner does not indicate the percentage of time that the beneficiary will spend on this duty. Consequently, the AAO cannot conclude that the beneficiary will actually provide services as a market research analyst.

The AAO finds that the proposed duties that relate to marketing¹ correspond to those of managerial positions in marketing, which the *Handbook* depicts as follows:

¹ The duties relating to marketing include creating and overseeing campaigns to increase cargo and courier services and retail business within the minority populations in the region, specifically among Asian populations; researching market conditions such as delivery and cargo preferences of customers; gathering

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.

According to the *Handbook*, managerial positions in marketing do not require a baccalaureate degree in a specific specialty. The *Handbook* 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. . . .

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. . . .

The AAO's conclusion, based on the above discussion, is that the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): 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 submitted job postings fail 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 companies in the postings are either not similar in nature to the petitioner, a small cargo forwarding and courier service, or they do not require a bachelor's degree in a specific specialty. American Chemical Society is in the chemical industry; [REDACTED] and [REDACTED] are technology companies; [REDACTED] is in the hotel industry; and other postings are from technology companies, a food service company, and an automotive supplier. I.T. Direct does not require a bachelor's degree in a specific specialty. For these reasons, the petitioner fails to establish that a specific degree

data on other shipping/cargo establishments in the area, analyzing their pricing structure, delivery plan, and advertising techniques and marketing methods. . . .

requirement is common to the industry in parallel positions among organizations that are similar to the petitioner.

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 AAO cannot conclude that the proposed duties are a combination of those of a management analyst and a market research analyst, both of which are positions that qualify as specialty occupations. 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 AAO cannot conclude that the proposed duties are a combination of those of a management analyst and a marketing analyst, both of which qualify as specialty occupations. Accordingly, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 director also determined that the beneficiary is not qualified for the proposed position. Because the AAO found that the proposed position does not qualify as a specialty occupation, the beneficiary's qualifications for the proposed position are irrelevant.

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.