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A 99 434 188

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be a telecommunications solutions center providing switching solutions to small and medium-sized communications companies. The petitioner claims 15 employees and \$360,000 in gross annual income on the Form I-129. It seeks to employ the beneficiary as a business analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 determining that the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 7, 2005 and supporting documentation; (2) the director's April 13, 2005 request for further evidence (RFE); (3) counsel for the petitioner's May 23, 2005 response to the director's request; (4) the director's June 6, 2005 denial letter; and (5) the Form I-290B, with counsel's brief and documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner seeks the beneficiary's services as a business analyst. In a March 14, 2005 letter appended to the petition, the petitioner stated:

The applicant will have full and overall responsibility in planning and developing, sales and marketing strategies and procedures to effectuate the optimal efficiency and profit in promoting and developing sales channels and increasing market shares.

This employee will research and analyze market conditions in local, regional and national areas to forecast future market trends; establishing research methodology and developing format for data gathering, utilizing various computer applications; gathering data on customer preferences, as well as competitors and analyzing prices, sales, and method of marketing; reviewing market research and analysis on consumer trends, behaviors, and preferences as well as promotional strategies and procedures of competitive telecommunication companies, to plan and develop new and more effective strategies, applying latest theories of economics and business to improve the company's personnel training, product marketing and developmental research[.]

The business analyst will be preparing reports and recommendations of actions for management to make changes to improve the company's personnel training product marketing and developmental research; preparing reports and recommendations of actions for management to make changes to improve our company's existing client contact and service by accommodating differing fluctuations within the telecommunications market; and aiding in the expansion of our client base.

It is important to note that this employee must deal with and understand the particular needs and objectives of this incredibly diverse constituency that we work with in promoting our telecommunication services.

The petitioner also indicated that it required the applicant to possess a minimum of a bachelor's degree in the field of business administration or a related field in order to perform the job duties set out in the application.

On April 13, 2005 the director issued an RFE, requesting among other things: "a copy of any written contracts [or work orders] between your firm and the beneficiary that indicates the services being provided by the beneficiary."

In a May 23, 2005 response, counsel for the petitioner noted that the petitioner had conclusively shown that the petitioner normally requires a specific degree for this particular position and thus had satisfied the federal regulation requirement. Counsel also attached a copy of a job offer from the petitioner to the beneficiary dated April 20, 2005 listing the duties of the business analyst as:

- Overall responsibility in planning and developing sales and marketing strategies and procedures to effectuate the optimal efficiency and profit in promoting and developing sales channels and increasing market shares.
- Research and analyze market conditions in local, regional and national areas to forecast future market trends.
- Establishing research methodology and developing format for data gathering, utilizing various computer applications.
- Gathering data on customer preferences, as well as competitors and analyzing prices, sales, and method of marketing.
- Reviewing market research and analysis on consumer trends, behaviors, and preferences as well as promotional strategies and procedures of competitive telecommunication companies.
- To plan and develop new and more effective strategies, applying latest theories of economics and business to improve the company's personnel training, product marketing and developmental research.
- Review organizational structure, work flow procedures and information systems to gather data.
- Breakdown procedures and problems by conducting work simplifications and measurement studies to design and develop effective solutions.
- Prepare reports and recommendations of actions for management to improve the company's personnel training and product marketing.
- Evaluate data retention schedules and determine effective strategies for data storage, efficient data retrieval and backup.
- Preparing reports and recommendations of actions for management to make changes to improve our company's existing client contact and service by accommodating differing fluctuations within the telecommunications market and aiding in the expansion of our client base.
- Interview end users and consult with management to review procedures, forms and reports to identify problems and improvements.

On June 6, 2005 the director denied the petition determining that the description of duties submitted by the petitioner contained elements of the occupations of marketing manager and market research analyst as reported by the Department of Labor's *Occupational Outlook Handbook (Handbook)*. The director noted that the occupation of marketing manager did not normally require a bachelor's degree and that the occupation of market research analyst does typically qualify as a specialty occupation. The director noted that the petitioner had not provided evidence that it had previously hired an employee with similar qualifications; that the petitioner had indicated it

did not have an employee in the same or similar position; and that the petitioner indicated that most of its personnel were engaged in marketing and sales. The director concluded that the evidence of record did not establish that the job offered qualified as a specialty occupation.

On appeal, counsel for the petitioner asserts that the director's perfunctory RFE failed to put the petitioner on notice that the director was questioning the nature of the position and whether it qualified as a specialty occupation. Counsel contends that the director deliberately altered the evidence when determining that the proffered position could be classified as a market research analyst rather than a business analyst as the petitioner had requested and further failed to explain the alteration in job title or articulate the reason for changing the job title. Counsel avers that the director impermissibly considered the size of the petitioner's organization when determining whether the proffered position is a specialty occupation. Counsel asserts that the regulatory requirements only require that the petitioner satisfy one of the four prongs and that the petitioner has already met the burden of substantiating that the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Counsel also asserts that CIS routinely approves petitions for the position of business analyst and submits copies of petitions and approval notices to substantiate his assertion. Counsel also submits a copy of an unpublished AAO decision regarding the occupation of research assistant for the proposition that a director cannot take matters into his or her own hands contrary to the regulations.

Preliminarily the AAO observes that the director requested evidence of the duties to be performed by the beneficiary in the April 13, 2005 RFE, when requesting "a copy of any written contracts [or work orders] between your firm and the beneficiary that indicates the services being provided by the beneficiary." Thus the petitioner was put on notice that the record was inadequate regarding the actual duties the beneficiary would perform. Moreover, the petitioner's remedy in this matter is the appeal process itself. The AAO agrees that the director did not well articulate the reasoning of his decision, but the decision clearly indicates that the director does not find the evidence in the record sufficient to establish the proffered position as a specialty occupation. The petitioner's redress in this matter is the appeal process. The petitioner had notice that it had not established that its proffered position satisfied any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that counsel has submitted copies of petitions and approval notices related to other matters. However, counsel should take note that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When 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). In addition, if the nonimmigrant petitions provided by counsel were approved based on the same general description as provided in this petition, those approvals would constitute material and gross error on the part of the director. The AAO finds that the record in this matter does not establish that the proffered position is that of a specialty occupation for the reasons articulated below.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Upon review of the petitioner's description of the proffered position's duties, the AAO finds that the broadly-described duties correspond to the duties of a marketing manager, a market research analyst, and a management analyst.

As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably. . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

* * *

Marketing managers develop the firm's detailed marketing strategy. 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 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 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 petitioner indicated that the beneficiary in the proffered position of "business analyst" would have "[o]verall responsibility in planning and developing sales and marketing strategies and procedures to effectuate the optimal efficiency and profit in promoting and developing sales channels and increasing market shares." This duty corresponds to the services rendered by a marketing manager.

The *Handbook* states the following with regard to the employment of marketing 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 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 may also 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.

In this matter, the petitioner indicated the beneficiary in the proffered position of "business analyst" would: "[r]esearch and analyze market conditions in local, regional and national areas to forecast future market trends;" "[establish] research methodology and [develop] format for data gathering, utilizing various computer applications;" "[gather] data on customer preferences, as well as competitors and [analyze] prices, sales, and method of marketing;" and "[review] market research and analysis on consumer trends, behaviors, and preferences as well as promotional strategies and procedures of competitive telecommunication companies." These duties correspond to the duties outlined above for a market research analyst.

The 2006-2007 edition of the *Handbook* discusses the employment of management analysts as follows:

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

* * *

Both public and private organizations use consultants for a variety of reasons. Some lack the internal resources needed to handle a project, while others need a consultant's expertise to determine what resources will be required and what problems may be encountered if they pursue a particular opportunity

* * *

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.

The petitioner's description of the "business analyst's" duties that relate to: planning and developing more effective strategies; applying economic theories; recommending actions to management to improve personnel

training, product marketing, and the company's existing contact and service, could be assigned the job title of either a market research analyst or perhaps a management analyst. The petitioner's indication that the beneficiary in the proffered position would: review the petitioner's organizational structure, workflow procedures, and information systems; design and develop solutions; and consult with management to review procedures, forms, and reports to identify problems and improvements, suggests the position will incorporate some duties of a management analyst.

The difficulty in analyzing the petitioner's description of the duties of the proffered position is that the description is general and provides only an overview of several occupations without providing the specificity and detail necessary to support the petitioner's contention that the position is a specialty occupation. The record does not provide any information that relates the beneficiary's actual daily duties to the specific requirements of the petitioner's telecommunications solutions business. The AAO cannot determine from the broadly-based description whether the petitioner expects the beneficiary to sell the petitioner's product, market the petitioner's product, train other personnel in selling and marketing the petitioner's product, or find solutions to the petitioner's undefined problems. The record is deficient in relating the specific duties of the proffered position to the petitioner's business.

A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a management analyst analyzes and proposes ways to improve an organization's structure, efficiency, or profits and a market research analyst gathers data and forecasts trends. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

In the instant matter, although the petitioner provided a lengthy description, the description it offered does not extend beyond the generalized outline of the proposed position and a recitation of a portion of the *Handbook's* statements noted above. The description of the proffered position, thus is insufficient to establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO routinely relies on the *Handbook* for the educational requirements of particular occupations. The AAO finds that the petitioner has described employment that combines elements of the occupations of a marketing manager, a market research analyst, and a management analyst. The AAO observes that both a management analyst position and a market research analyst position may impose a degree requirement on the individuals seeking employment in those positions. However, as determined above, the AAO does not find that the petitioner's description of the position's duties sufficient to establish the position as a specialty occupation, as the petitioner provides an outline of the duties to be performed rather than a description of the actual duties the beneficiary would undertake in relation to the petitioner's business operations.

As previously discussed, the AAO requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a

day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent in a directly related academic specialty. As the record in the instant case offers no meaningful description of the proffered position's responsibilities, the petitioner has not established that the duties of the position are those of a management/market research analyst/marketing manager. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Without a meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. The AAO notes that the petitioner has not provided any evidence to support a determination that it has satisfied either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): whether the employer normally requires a degree or its equivalent for the position; or whether 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.

The petitioner has not provided evidence that it normally requires a degree or its equivalent for the position. The AAO usually 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 to assist in making a determination on this criterion. The record does not contain any such evidence for review. Accordingly, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation under the requirement set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the general description of the beneficiary's duties provided by the record does not substantiate that they are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. The AAO acknowledges counsel's assertion on appeal that the petitioner has already met the burden of substantiating 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. Again, as observed above, a review of the record, does not reveal a description of duties that includes the specific duties that the petitioner expects the beneficiary to perform. Providing a broad outline of various occupations does not provide an understanding of how or what the beneficiary will actually be doing for the petitioner's business. The AAO agrees that the size of the petitioner's operation and the type of the petitioner's industry do not affect the need or lack of a need for a professional. Rather, the actual duties the incumbent of the proffered position will perform for the petitioner are the determining factors. Here, the petitioner has not described how it will utilize the services of the beneficiary in relation to its telecommunications business. The AAO is left with general information about two or more

occupations and no language or documentary evidence connecting the nonspecific duties of those occupations to the petitioner's business. Stated a different way, the generic description provided by the petitioner can apply and be used interchangeably to describe the duties of any market researcher, management analyst or marketing manager in a myriad number of companies. The description does not focus on the specific requirements of this petitioner who claims 15 employees and a gross annual income of \$360,000.¹

The AAO declines to accept a broad overview of an occupation as definitive of a particular position's daily duties. The petitioner must provide some evidence of the daily tasks the petitioner requires from the proffered position. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS, however, must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

Without a detailed list of duties related to its specific business operations, the petitioner has not established that such duties are either specialized or complex. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has not established that the proffered position is a specialty. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reason. As always, 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.

¹ The petitioner's 2003 Internal Revenue Service Federal Tax Return indicates the petitioner's gross income as \$210,031, no salaries or wages paid, and no costs of labor.