

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



1/2

MAY 29 2008

FILE: WAC 07 138 50929 Office: CALIFORNIA SERVICE CENTER Date: ~~MAY 29 2008~~

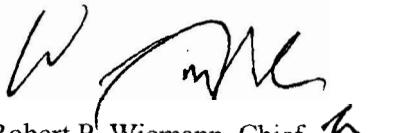
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 a computer hardware sales business that seeks to employ the beneficiary as a management analyst/marketing. 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching 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) consistently 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.

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.

The petitioner seeks the beneficiary’s services as a management analyst/marketing. Evidence of the beneficiary’s duties includes: the petitioner’s March 30, 2007 letter in support of the petition and counsel’s May 24, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

Design marketing strategies to increase the petitioner’s market share. Review and evaluate the petitioner’s current marketing strategies and methods; based on the findings, design and establish new strategies and procedures. Conduct work simplification and procedural logistics review with the goal of lowering costs. Communicate with the petitioner’s manufacturers about new or updated product development for incorporation in both the marketing plans and the production/procedural logistics.

In response to the RFE, the petitioner’s president provided the following job description and allocation of duties:

1. Review and evaluate current marketing strategies:

- A. Outline markets currently being served by company (6%);
- B. Review existing advertising strategies (6%);

- C. Track market pricing (6%);
 - D. Communicate with wholesalers and retail customers (6%);
 - E. Sales forecasting (6%);
 - F. Investigate competing companies (6%); and
 - G. Research related industries and markets (6%).
- 2. Design and establish new strategies and procedures:**
- A. Develop prices sheets for product lines (6%);
 - B. Attend trade shows (4%); and
 - C. Identify emerging markets and possible partnerships that may be profitable entry points for current or in-development product lines (6%).
- 3. Work simplification and procedural logistics review:**
- A. Review returned merchandise authorization procedures (4%); and
 - B. Review shipping policies (4%).
- 4. Communicate with manufacturers regarding new or updated product development:**
- A. Serve as liaison to manufacturers (6%); and
 - B. Troubleshoot product development issues between company and manufacturers (5%).
- 5. Monitor periodically changes and progress:**
- A. Monitor manufacturer's information regarding product availability and new product development (5%);
 - B. Monitor product pricing and competitors' product pricing (6%);
 - C. Conduct regular literature and Internet searches related to industry (6%); and
 - D. Prepare status reports on product sales and pricing, competitor reports, RMA status reports, and general related industry analysis reports (6%).

The director found that the petitioner had not established that a specialty position is available for the beneficiary. The director noted that the proffered position is not similar to the "Management Analysts" occupational category as described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position combines the duties of a management analyst and a market researcher, but is primarily a market researcher job for the petitioner, which is a subsidiary of a company headquartered in Japan with 70 employees and offices in five Japanese cities. Counsel also states that the job description is consistent with the duties of a specialty occupation, as outlined in the *Handbook*, the *Dictionary of Occupational Titles (DOT)*, and the *O*Net*.

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.

The AAO turns first to 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 acknowledges counsel's statement that the job description is consistent with the duties of a specialty occupation, as outlined in the DOL's *Dictionary of Occupational Titles (DOT)* and the *O*Net*. Counsel's reference to and assertions about the relevance of information from the *DOT* and the *O*Net*, however, are not persuasive. Neither the *DOT*'s SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO acknowledges counsel's assertion that the proffered position combines the duties of a management analyst and a market researcher. The AAO, however, does not concur with counsel that the proffered position is that of a management analyst, which in private industry generally requires a master's degree in business administration or a related discipline. See the *Handbook*, 2006-07 edition. In this case, information on the petition reflects that the petitioner was established in 1998 and has four employees. Information on the petitioner's 2004 federal income tax return for the period beginning on November 1, 2004 and ending on October 31, 2005, reflects \$3,921,526.00 in gross receipts or sales, \$31,632.00 in compensation of officers, and \$87,529.00 in salaries and wages. Although counsel states that the petitioner is a subsidiary of its parent company in Japan, counsel has not provided documentary evidence to establish how the beneficiary's actual substantive work would require at least a bachelor's degree level of knowledge in a specific specialty. Counsel also concedes on appeal that the responsibilities related to a management analyst position "may be perceived as prospective in nature." A visa petition, however, may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Counsel's assertion that the proffered position is primarily that of a market researcher, is noted. While a review of the Market and Survey Researchers category in the 2006-07 *Handbook* finds that market research analysts are employed throughout the economy, the *Handbook* does not indicate that a bachelor's degree in a

specific specialty is required for a market research analyst position. While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not provide a description of duties in a market research analyst-related field that would require a master's degree, as described in the *Handbook*.

A review of the Advertising, Marketing, Promotions, Public Relations, and Sales Managers occupational category in the *Handbook* finds that the proposed duties are primarily those of a marketing manager. For example, the proposed duties entail reviewing and evaluating current marketing strategies, designing and establishing new marketing strategies and procedures, and monitoring manufacturer's information regarding product availability and new product development. These duties correspond with the duties described in the *Handbook* for a marketing manager. A review of the *Handbook* finds no evidence indicating that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally required for a marketing manager. Moreover, although counsel asserts on appeal that the director did not focus her adjudication on the petitioner's subsidiary status, neither counsel nor the petitioner provides any evidence of international business transactions that elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. Simply going on record without supporting documentary evidence is not sufficient for the purpose 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for management/operations analyst positions. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. The banking/financial services, procurement services, State education, and information technology businesses are not similar to the petitioner's computer hardware sales business. Neither do these listings indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Moreover, the duties listed in the advertisements are not parallel to those outlined by the petitioner. Thus, the postings are not probative.

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a marketing manager. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a

specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As counsel does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

On appeal, counsel reiterates the job duties that were provided in response to the director’s RFE. The petitioner, however, has not established that they exceed in scope, specialization, or complexity those usually performed by marketing managers, an occupational category that does not require a baccalaureate or higher degree in a specific specialty. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 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. For this reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director’s denial of the petition.

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.