D2

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 192 52548 Office: CALIFORNIA SERVICE CENTER Date: APR 23 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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 sustained. The petition will be approved.

The petitioner is an international trade, engineering, and project-coordination corporation that provides business development support services between the United States and Asia, with a primary focus on Japan. The petitioner is also the official business partner of CATIA IBM, and, as such, it offers a full spectrum of CATIA Product Lifecycle Management products and technical and business services to clients who especially need product support in Japanese. In order to employ the beneficiary as a marketing psychologist, the petitioner 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 petitioner had failed to establish that the proffered position is a specialty occupation.

On appeal, briefs have been submitted by initial counsel and present counsel.[1] Initial counsel has also submitted additional evidence, and the petitioner's president and chief executive officer (CEO) presents a letter in support of the appeal.

This decision will first address several of counsel's objections to the content of the director's decision.

Counsel correctly notes that it would be a material error to deny an H-1B petition on the basis of the petitioner's size. The AAO, however, does not agree with counsel that it is evident that the director based her decision upon this factor.

The AAO agrees with counsel that the evidence of record does not support the director's finding that there is not "a reasonable and credible offer of employment that is consistent with the needs of the petitioning organization." Likewise, the record does not support the director's finding that "it cannot be concluded that there is a bona fide position." Rather, the evidence demonstrates that the proposed duties all materially relate to important aspects of the petitioner's business.

The AAO also agrees that the finding against the proffered position's authenticity appears to be based upon an evidentiary requirement not found in CIS regulations, to wit, that a petitioner must establish that either (1) "the types of duties to be performed are normal and customary requirements in similar organizations in the petitioner's industry," or (2) the petitioner has "unique and specific needs for such services for the period of time in which they intend to employ the individual." This requirement is not found in the specialty occupation provisions at 8 C.F.R. § 214.2(h)(4)(iii)(A). A petitioner is not required to prove that its offer of employment comports with, or is a valid exception to, the hiring practices of other firms in its industry.

Counsel asserts a number of factual errors in the director's decision. Counsel correctly notes that, at one point, the decision mistakenly referred to the petitioner as an electronics distributor. Also, the decision misstated the petitioner's gross income as "$1,232, 232,000," but this appears to be a clerical error in noting the "$1,232,232.00" gross sales/receipt amount reported on the petitioner's Form 1120 Federal tax return for

[1] During the pendency of the appeal, the petitioner has retained new counsel, hereinafter referred to simply as counsel.

2000. As also noted by counsel, the director's decision incorrectly stated that the beneficiary's transcript did not indicate any business courses. The transcript does reflect a course in math analysis for business. However, the macroeconomic analysis course and the statistics course that counsel also cites are not listed as business courses. The transcript codes the macroeconomic course as an economics course; and the statistics course is an introduction to psychological (not business) statistics, and it is coded as a psychology course. Finally, the director did not err in stating that the petitioner had provided information about economists: among the matters submitted with the RFE reply is copy of the Internet version of the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) section entitled "Economists and Market and Survey Researchers." These errors are of no material consequence, and they do not establish that the director's decision was made without due regard to the record.

In reaching its decision, the AAO considered the entire record of proceeding, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief, initial counsel's brief and documentary evidence, and the March 16, 2004 letter from the petitioner's president/CEO in support of the appeal.

As discussed below, the AAO has determined that the petitioner has presented an adequate evidentiary basis for classifying the proffered position as a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. As presented in the record, the proposed duties do not comport with those of the marketing research analyst occupation as described in the *Handbook*. Accordingly, the petitioner's evidence about marketing research analyst positions has no persuasive value. Also, the information about the proposed duties does not comport with any particular occupation's description in the *Handbook*.

The job vacancy advertisements submitted into the record have no probative value. The advertised positions are not parallel to the one proffered here. Furthermore, the wide divergence of educational requirements in the advertisements is not indicative of a requirement for a degree in a specific specialty.

The AAO has reviewed and considered all the evidence about the proffered position and its duties. Here follows a brief review of major points of information in the record.

The Form I-129 described the proposed duties as follows:

> Evaluate proposed advertising, packaging, promotions, and business approach suitable in the U.S. and Japanese markets. Research consumer behavioral data, design consumer profiles and develop and present learned opinions on socially and psychologically relevant consumer trends. She will identify cultural and social purchasing trends and their impact on selected demographic markets.

The undated "Job Announcement" document identified the position as marketing psychologist and described the duties as follows:

> Research and design of strategic marketing approaches based on psychological analysis of cross-cultural models. Conduct research of consumer trends and consumer reactions, package design and use of U.S. products in Asian market. Measure effectiveness of advertising media to aid in sale of goods and services in global markets. Assist Marketing team in promoting and creating consumer interest in [the petitioner's] products and services for an Asian market. B.A. in psychology or marketing . . . .

In his letter of support that was filed with the Form I-129, the petitioner's president/CEO stated, in part:

> Specifically, [the beneficiary] will assist U.S. companies by working with the marketing department regarding how to approach the Japanese market and consumer from a cross-cultural perspective. She will meet with clients and the business development team to examine and resolve issues regarding U.S. products entering a Japanese market. The Marketing and Business Development departments must determine what proposed changes to U.S. products, packaging, promotions, use, etc.[,] must be altered or revised for the Japanese consumer. [The beneficiary] must evaluate cultural factors, human behavior and market trends to determine how to sell U.S. products in a Japanese market and present to Japanese

> corporations how to approach the American consumer and market Japanese products in a U.S. market.
>
> In addition, [the beneficiary] will use relevant social data, knowledge of human behavior and research about consumer trends in Asia and the U.S. to coordinated [sic] product sales and contract negotiations between both cultures. She will draw upon her extensive knowledge of mass[-]market consumer behavior, social trends, [and] business psychology to research, design and propose successful business approaches and create business plans that train U.S. executives [in] how to culturally approach business transactions and contract negotiations with Japanese counterparts.

According to this letter, the responsibilities of the proffered position would include these functions:

- Advise IT, Business and Marketing teams in cross-cultural approach in planning and direction of advertising policies and programs.
- Research and design marketing approach based on psychological models.
- Conduct research of consumer trends and consumer reactions to new products, package design, use, etc.
- Measure effectiveness of advertising media to aid in sales of goods and services.
- Review market trends and consumer preferences within target regions.
- Assist marketing team in promoting and creating consumer interest in [the petitioner's] products and [s]ervices for an Asian market.

In this letter, the president/CEO also indicated that the proffered position would require interpretation of relevant social data; application of knowledge of cross-cultural perspectives, mass-market consumer behavior, social trends, business psychology, and research on Asian and U.S. consumer trends; statistical analysis; and utilization of an advanced understanding of American and Asian cultures.

According to the letter that the petitioner's Product Sales Business Manager (sales manager) provided on appeal, the marketing psychologist would play a critical role in bridging the gap between Japanese and American business and consumer cultures, so that the petitioner can successfully broker, consummate, and then consult on business deals between American companies and Japanese investors, and vice versa.

In a document entitled "Expert Opinion Evaluation," Dr [redacted] an associate professor of marketing at St. Louis University, stated that a marketing psychologist position requires these duties:

- Evaluate proposed advertising, packaging, promotions, and business approaches appropriate for the U.S. and Japanese markets;
- Research consumer behavior, design consumer profiles and present summary reports on socially and psychologically relevant consumer trends;

- Identify cultural norms and social mores influencing buyer behavior and apply these insights to demographic and psychographic market segmentation;

- Assist U.S. companies with the international marketing, especially in targeting the Japanese market and consumer and in utilizing a cross-cultural perspective;

- Cultivate clients and consult with the business development team to examine and resolve issues regarding U.S. products entering the Japanese market; and

- Evaluate cultural factors, social behavior and market trends to determine how to sell U.S. products in the Japanese market and to advise Japanese corporations on effective appeals to the American consumer, applying marketing psychology expertise to market products in the U.S. market.

As an illustrative example of the proposed duties, the sales manager's letter discusses a project involving a client U.S. company that hopes to introduce its specialized software into the Japanese consumer market. When the client company first approaches the petitioner for assistance, the beneficiary would be tasked to research the Japanese market to identify a company that could distribute or co-manufacture the product. Once the client company decides to enter into discussions with a particular Japanese company, the beneficiary would act as an intermediary between the companies to arrange for them to meet for a presentation and discussions on the proposed arrangement. Prior to the presentation date, the beneficiary would meet extensively with the U.S. company to assess its requirements and to assist it in developing a presentation that will effectively communicate the market potential of the product. At the presentation stage and during contract negotiations, the marketing psychologist would intercede as necessary to avoid misunderstandings and conflicts that may arise from the different outlooks and concerns of Japanese and American companies. Once the contract is executed, the beneficiary would work on the necessary concepts and formats that the Japanese company's marketing people would use to repackage, market, and advertise the American company's product as appropriate for the Japanese consumer.

The AAO finds that the petitioner has satisfied the criterion at 8 C.F.R. §§ 214.2 (h)(4)(iii)(A)(*4*) by establishing that the nature of the specific duties is so specialized and complex that their performance requires knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific specialty.

The decisive evidence is Dr. Fischer's opinion on the educational credentials required to perform the marketing psychology duties of the position. Dr. Fischer stated, in pertinent part:

> [T]he position Marketing Psychologist requires the theoretical and practical application of an advanced highly specialized body of knowledge in the field of Marketing and Industrial Psychology, which requires the attainment of a Bachelor's degree or its equivalent as the minimum requirement for entry into the occupation. Additionally, a Bachelor's degree provides the necessary skills and abilities such as decision-making, problem solving, and analytical thinking. These skills are usually developed in the junior and senior years of an undergraduate program in Marketing and Industrial Psychology.

> It is my opinion that the position of Marketing Psychologist is clearly a specialty position as the nature of the specific duties are sufficiently specialized and complex that it requires the services of someone with at least a Bachelor's degree in Marketing and Industrial Psychology or a related field to perform these responsibilities. The position of Marketing Psychologist has responsibilities and authority commensurate with professional standing. The skills required in order to examine and resolve issues regarding the marketing of U.S. products to Japanese markets and to evaluate cultural factors, social behavior and market trends to determine how to sell U.S. product[s] to a Japanese market are typically taught in such courses as Principles of Marketing, Industrial Psychology, Social Psychology, and Market Research. Additionally, the responsibilities of the position of Marketing Psychologist require specialized knowledge that can be gained in such courses as Marketing Management, Cross-Cultural Psychology, Buyer Behavior, and related areas, which are typical components of a Bachelor's degree in Marketing and Industrial Psychology. This position requires a thorough understanding of several technical fields, knowledge that is typically gained through the completion of Bachelor's-level work. Therefore, it is unlikely that someone would be hired for the position and be able to fulfill its responsibilities without first attaining a Bachelor's degree.

It is noted that the AAO accorded little evidentiary weight to the one-paragraph opinion [redacted] of the Mercy College in which he stated that he agreed with Dr [redacted] evaluation of the educational requirements of a marketing psychologist. Mr [redacted] opinion, in part, misstates Dr [redacted] conclusion, and is, therefore, inconsistent with what it purports to do. While Dr. [redacted] spoke in terms of a requirement for "at least a Bachelor's degree in Marketing and Industrial Psychology," Mr. [redacted] stated, in part, "I agree with Dr. [redacted] assessment that the position of Marketing Psychologist requires at least a Bachelor's Degree in Psychology or a related field." CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Also, Mr [redacted] paragraph is silent as to his qualifications, and the attached resume does not establish that he has specialized knowledge in the area of marketing and industrial psychology. The form letter from Morningside Evaluation and Consulting, which appears to have accompanied Mr. [redacted] letter, provides no meaningful information about Mr. [redacted] expertise.

This finding that the proffered position is a specialty occupation within the meaning of 8 C.F.R. § 214.2 (h)(4)(iii)(A) leads to the issue of whether the beneficiary is qualified to perform services in a specialty occupation in accordance with 8 C.F.R. § 214.2 (h)(4)(iii)(C).

The wording of the director's decision sufficiently conveys that the issue of the beneficiary's qualification was a basis for the denial of the petition. Because, as noted in initial counsel's brief, the RFE did not address the beneficiary's qualifications, this aspect of the denial violated the provision at 8 C.F.R. §103.2(b)(8), which allows for a petitioner's opportunity to respond to CIS determinations that "the evidence submitted either does not establish eligibility for the requested benefit or raises underlying questions about eligibility." However, this error is of no consequence to the outcome of this proceeding, because the record as presently constituted establishes that the beneficiary's baccalaureate degree in psychology from San Francisco State University is an appropriate credential to perform the duties of the proffered position.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.