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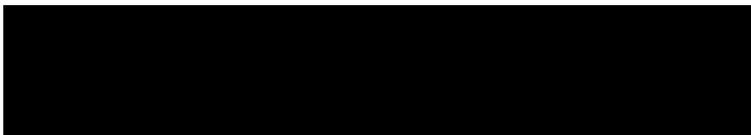
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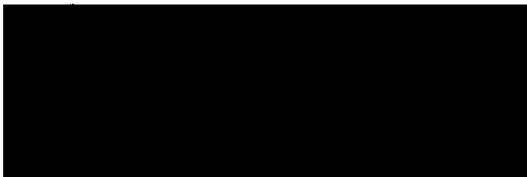
FILE: WAC 04 017 53185 Office: CALIFORNIA SERVICE CENTER Date: **AUG 31 2005**

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 materials 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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a coffee and juice retail shop. It seeks to employ the beneficiary as a marketing research analyst and to classify him 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 the record failed to establish that the proffered position is 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

In a letter accompanying Form I-129 the petitioner described itself as a retail distributor of coffee and tea products, that it was incorporated in February 2002, and that it had four employees at the time the instant petition was filed. The petitioner stated that the business generated gross income of \$360,000 in 2002. To further its business development goals of strengthening its customer base and opening additional stores in the greater Los Angeles area, the petitioner indicated that it sought the professional expertise of a marketing research analyst. According to the petitioner the proffered position required a bachelor's degree in marketing, commerce, economics, or statistics. The record indicates that the beneficiary received a bachelor of science in business administration from the University of the East in Manila, the Philippines, on March 28, 1992. In response to the RFE the petitioner described the duties of the position, and the percentage of time required by each, as follows:

- 50%** Conduct research to assess current market conditions in Greater Los Angeles and nearby counties, evaluate company's major food product lines' revenue-generating potentials and capabilities, and the feasibility of putting up more outlets. Design research and survey instruments based on the nature of the research needed to gather relevant data and information to come up with reliable results. Evaluate company's major food product lines potential market share taking into account existing competitors or major players in the industry. Determine the required number of respondents based on the total population sample to achieve reliable results. Research the latest consumer survey reports regarding sales and marketing of flavored coffee and tea products.
- 20%** Consolidate all relevant information based on the research, plot numerical results through frequency distribution, and analyze results to determine the level of significance through the application of various statistical techniques, including One-way or Two-way Analysis of Variance, Chi-Square, and T-Test.
- 30%** Preparation of reports discussing the significant findings of the studies and their impact on the petitioner's projected business expansion projects. The reports will detail information on the number of existing competitors, the quality of services and the variations and similarities of their product lines, packaging and presentation, the level of competition, pricing, sales and promotions, and the types of customers being targeted.

In his decision the director determined that the market research analyst position described by the petitioner was not a reasonable and credible offer of employment consistent with the company's scale of operations and type of business. The director referred to the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, which indicated that market research analysts are employed by private and public sector entities that are far different from the petitioner's retail shop. The director also referred to a series of job announcements in the record from other companies seeking market research analysts, but noted that all of the companies appeared much larger than the petitioner and that their business needs would be different. Accordingly, the announcements did not involve parallel positions in similar organizations. The record did not show that the petitioner normally required applicants for the position to have a bachelor's degree in the field, the director stated, or that the duties of the position and its level of responsibility indicated complexity and authority beyond that normally encountered in the occupational field. In the director's judgement, the evidence of record was not persuasive to show that the proffered

position could not be performed by an experienced individual with a sub-baccalaureate level of education. The director concluded that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

On appeal counsel asserts that the duties of the proffered position are those of a market research analyst because they involve complex and specialized techniques of market research and analysis requiring the application of a highly specialized body of knowledge based on marketing and research theories and principles acquired in a baccalaureate degree program. Counsel interprets the *Handbook* as indicating that a bachelor's degree or its equivalent is the normal minimum requirement for entry into a market research analyst position, thus making it a specialty occupation.

The occupation of market research analyst is described in the *Handbook*, 2004-05 edition, at 173:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon 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 might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

. . . . The industries which employ the largest number of market research analysts are management, scientific, and technical consulting firms, insurance carriers, computer

systems design and related firms, software publishers, securities and commodities brokers, and advertising and related firms.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are determinative, not the title of the position. The petitioner must show that the performance demands of the position compel its degree requirement. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

The AAO agrees with the director's determination, based on all the evidence of record, that the performance demands of the proffered position do not describe the services of a market research analyst and that the beneficiary would not be performing the services of a market research analyst in the proffered position. The AAO determines that the duties of the proffered position reflect those of a marketing manager, as described in the *Handbook, id.*, at page 23:

Marketing managers develop the firm's detailed marketing strategy. . . . [T]hey determine 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 with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. . . . [T]hey monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising managers to promote the firm's products and services and to attract potential users.

With respect to the educational requirements of a marketing manager, the *Handbook* states as follows:

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.

As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal, industry-wide requirement for entry into a marketing manager or sales manager position. Many employers give favorable consideration to a broad spectrum of degrees in hiring a marketing manager. Thus, a marketing manager does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement to enter into such a position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record includes the previously referenced Internet job postings for market research analysts. However, none of the advertising companies is comparable to the petitioner in its scale of operations or line of business. Moreover, the AAO has determined that the duties of the proffered position are those of a

marketing manager, not a market research analyst. Thus, the Internet job postings do not establish that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the evidence of record demonstrate that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Thus, the petitioner cannot show that it normally requires a baccalaureate or higher degree in a specific specialty, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not qualify as a specialty occupation under the fourth alternative criterion, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. As far as the record shows, neither the duties of the position nor the particular circumstances of the petitioner's business distinguish the proffered position in any significant way from that of any other marketing manager in the industry, for whom knowledge associated with a degree in a specific specialty is not normally required.

For the reasons discussed above, the proffered position does not qualify as a specialty occupation under any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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