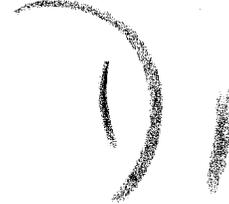
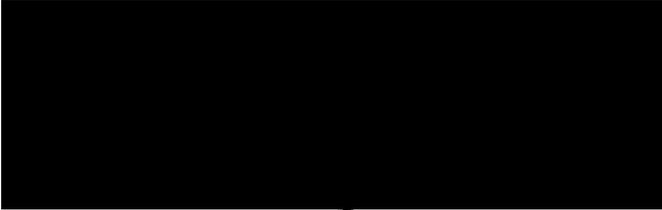


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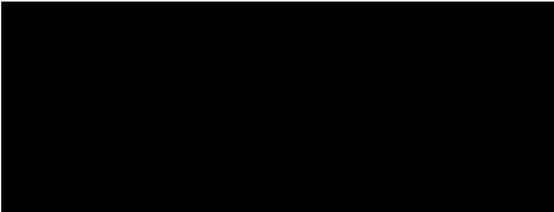
Date: AUG 31 2005

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 consulting company for high technology products. It seeks to employ the beneficiary as a marketing research analyst and to classify her 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, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In Form I-129 and an accompanying letter the petitioner described itself as a consulting company specializing in marketing high technology products in international markets, that it was established in 2001, and that it had three employees at the time the instant petition was filed. To further its business development goals the petitioner indicated that it intended to hire a marketing research analyst. The duties of the position, and the percentage of time required by each duty, were listed as follows:

- Research target markets and analyze market needs in order to provide decision makers with sufficient information – 20%.
- Develop and implement direct marketing plans and programs – 20%.
- Facilitate communication and collaboration to create more productive and efficient catalog mailings – 15%.
- Participate in developing advertising materials, marketing brochures, newsletters, and incentive programs – 15%.
- Forecast and analyze circulation, response, demand, and profits across multiple channels for multiple segments of clients – 10%.
- Research ways to improve clients' response, demand and profits across existing and new channels – 10%
- Provide clear, concise management reports for the customer acquisition team and insure proper execution of mailing events and be able to relate the impact of costs on marketing initiatives – 10%

The petitioner stated that the minimum educational requirement for the position is a bachelor's degree in business or a related discipline. The beneficiary has a bachelor's degree in economics, with a major in international economic cooperation, from Tianjin Institute of Finance and Economics in China, awarded on July 14, 1991. According to an academic evaluation report in the record the beneficiary's degree is equivalent to a bachelor of science in business administration with a specialization in international economics and trade from a U.S. college or university.

In his decision the director determined that the duties of the proffered position were not those of a market research analyst. Rather, the duties of the position reflected those of advertising, marketing, promotions, public relations, and sales managers, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*. According to the *Handbook*, a baccalaureate level of study is not a normal, industry-wide requirement for entry into that occupation. 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. 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 only 15% of the duties of the proffered position involve advertising, whereas 85% involve market research and analysis. Counsel cites an excerpt from the DOL *Handbook* stating that market research analysts provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services, and maintains that these are key duties of the proffered position. Counsel contends that the minimum educational requirement for a market research analyst is a bachelor's degree in business, and submits three internet job announcements for market research analysts, each of which requires a bachelor's degree.

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.

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 that the evidence of record does not establish that the proffered position in this case is actually that of a market research analyst. The job description does not indicate that the beneficiary would be performing typical market research duties such as devising methods and procedures for obtaining needed data, designing surveys, and conducting them by telephone, over the Internet, or in person. The research techniques utilized by market research analysts involve a level of sophistication that is not evident in the duties of the proffered position.

The AAO agrees with the director that the proffered position falls within the *Handbook's* broad occupational category of advertising, marketing, promotions, public relations, and sales managers. Within that occupational category, the AAO determines that the duties of the proffered position most closely resembles 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 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 petitioner has submitted three Internet job postings for market research analysts. The advertisements do not indicate that the companies are similar to the petitioner in their scale of operations. 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).

Since the proffered position is newly created the petitioner has no history of requiring a specialty degree or its equivalent. Accordingly, the position does not meet the third alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that they require baccalaureate level knowledge in a specific specialty. Accordingly, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the position proffered by the petitioner 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.