

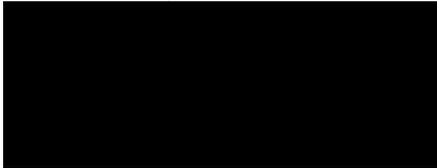
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U.S. Citizenship
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FILE: WAC 03 200 50819 Office: CALIFORNIA SERVICE CENTER Date: **APR 29 2005**

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen. The motion is granted, and the prior decision of the AAO is withdrawn. Upon consideration of the appeal, the appeal will be dismissed, and the petition will be denied.

The petitioner is a corporation engaged in the wholesale tire distribution business. In order to employ the beneficiary as a market research analyst, 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 on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel subsequently filed a timely Form I-290B. However, the AAO summarily dismissed the appeal because it had not received the documents that the Form I-290B stated would follow in 30 days. On motion, counsel has overcome the basis of the summary dismissal, by demonstrating that, prior to the AAO decision, he had filed the material specifying the grounds of the appeal. Accordingly, the AAO's previous decision will be withdrawn, and the AAO will consider the appeal.

The director expressly recognized that a market research analyst is a specialty occupation, but he found that the petitioner had not established that it was offering that type of position. On appeal, counsel contends that the director erred and that the petition should have been approved. According to counsel, the evidence of record clearly establishes that the beneficiary would be employed as a market research analyst.

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (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 and counsel's brief and accompanying documents.

The AAO concurs with counsel that the director erred to the extent that he based his decision on the fact that the petitioner's business is not included among the types that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* lists as the employers hiring most market research analysts. However, as discussed below, the AAO finds that the appeal must be denied because the petitioner has otherwise failed to establish that the proffered position satisfies any of the specialty occupation criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation

which [1] 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 [2] 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. (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

At section 1 of the Form I-129, the petitioner describes the proposed duties as follows:

Perform market research duties of local and national markets to determine potential buyers and suppliers for our services; Research, examine, and analyze statistical data concerning demand and supply to forecast future marketing trends; Establish comparative market studies by gathering data on competitors and analyzing prices, sales, methods of marketing, and product distribution; Conduct marketing surveys & feasibility studies to determine new sources of products. Analyze and present data in [the] form of reports and graphic illustrations, using computer wordprocessing and statistical software; Confer with top management regarding survey analysis and maintain general information about marketing and economic conditions of targeted areas; Based on marketing studies, evaluate and recommend to management cost/capital investment needed for business expansion programs, and devise a method to monitor expenses.

As evident above, the petitioner limited its description of the proposed duties to generic and generalized terms that convey no meaningful information about the specific tasks that would engage the beneficiary or the particular knowledge, skills, and competencies that the beneficiary would have to apply to perform her duties. Consequently, the petitioner has not presented sufficient evidence to satisfy any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) and thereby establish the proffered position requires the practical and theoretical application of a body of highly specialized knowledge that is acquired by at least a bachelor's degree, or its equivalent in a specific specialty, as required by the Act.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

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 evidence of record about the proffered position and its duties is abstract and generalized, and does not establish that the beneficiary would be employed as a market research analyst as that occupation is presented in the *Handbook*, which the AAO recognizes as an authoritative source on the duties and educational requirements of a wide variety of occupations.¹

¹ The AAO consulted the current, 2004-2005 edition of the *Handbook*.

The *Handbook*, at page 173, describes the employment of market research analysts as follows:

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

After compiling the data, market research analysts evaluate them 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

Because of the applicability of market research to many industries, market research analysts are employed in most industries

As a whole, the *Handbook's* information on market research analysts conveys that their work is characterized by design and implementation of data-collection methodologies, data collection, and precise data analysis, at a level of expertise that most often requires a master's degree. In light of the limited, generalized extent to which the proposed duties are described in the record, it is not evident that the beneficiary's involvement with marketing would be on such a specialized methodological and analytical level. Even on appeal, when counsel knows that the nature of the beneficiary's duties is critical to the outcome of the proceeding, no specific information is provided about the research methodologies and analytical tools that the beneficiary would employ. Counsel remains on the abstract level, stating for instance, that the position "involves gathering data, analyzing such dat[a], using precise mathematical methods, producing reports of the analysis and making prediction of the potential sales of the petitioner's services." (Brief on appeal, at page 6.)

The generalized information about the proffered position is also insufficient to identify the position with any other occupation, besides market research analyst, which requires at least a bachelor's degree or its equivalent in a specific specialty.

As the evidence of record has not established that the proffered position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

To the extent that they were submitted to reflect that market research analyst positions belong to a specialty occupation, the record's job advertisements are superfluous: the director expressly accepted this type of position as a specialty occupation.

The petitioner has also presented those advertisements as evidence that the proffered position itself should be grouped among market analyst positions, due to the similarity between the advertised positions and the proffered position. However, these advertisements are irrelevant: the evidence of record about the proffered position is too generalized to establish that position as substantially similar to the positions advertised.

The record contains no evidence about degree requirements for substantially similar or parallel positions to corroborate the petitioner's claim that the proffered position requires a degree in a specific specialty.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner an opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. The limited extent to which the proffered position is depicted in the record does not allow the AAO to conclude that the duties require a degree in a specific specialty. The petitioner must do more than recite the job duties in the *Handbook*; it must show how the job duties are to be performed on a day-to-day basis within the context of the petitioner's business in order for CIS to make a meaningful analysis of the complexity of the tasks.

The petitioner has not presented evidence to address the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Although counsel contends that the petitioner has met this criterion, counsel's assertion is not substantiated by the evidence of record. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

ORDER: The AAO decision of September 16, 2004 is withdrawn. The appeal is dismissed. The petition is denied.