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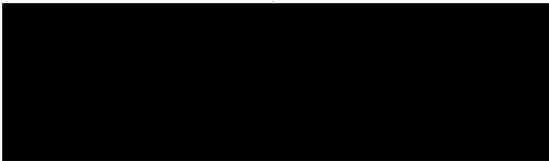


FILE: WAC 04 151 53605 Office: CALIFORNIA SERVICE CENTER Date: DEC 28 2005

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:



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.

Per Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

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 dismissed. The petition will be denied.

The petitioner is a company that develops, manufactures and distributes screen printing products that seeks to employ the beneficiary as an Asian marketing 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation, including counsel's 15-page brief on appeal and its attached exhibits. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an Asian marketing analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's April 14, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: conducting marketing research in the United States and Asian countries to determine market potentials for current and new product development; formulating research methodology (quantitative and qualitative) and data gathering methods, such as surveys, opinion polls, questionnaires, Delphi survey or focus groups; collecting data on changes of customer preference, buying patterns and behaviors; preparing reports and graphic illustrations of findings; establishing and developing business relationships with major buyers and suppliers; communicating with major buyers in various Asian communities; developing long-term relationships with industry leaders and business partners; examining and analyzing statistical data and recommending appropriate marketing strategies to management to maximize the company's long- and short-term profits and increase market shares; performing logistic management throughout the distribution channels; negotiating general agreements on marketing with business partners and forming strategic alliances with retailers and wholesalers; providing solutions to any problems related to marketing, international business transactions, shipping and distribution; collecting marketing data through sources, such as industrial reports, statistics, and demographic information and applying the findings to business plan and preparing a marketing plan for management review; making suggestions in the marketing campaign; developing and maintaining public relations; managing logistics of the marketing channel; conferring with sales people for first-hand market feedback; discussing marketing strategy with management; leading the sales force in terms of market concentration, shift of focus; using bilingual skills in business development, by communicating with ethnic groups, communities and foreign countries; managing the entire sales force and making hiring and firing suggestions; and participating in important contract negotiations with business partners. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in marketing or business administration.

The director found that the proffered position was not a specialty occupation. In addition, the director found that the petitioner is not the type of company that typically employs market research analysts. The director found further 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 that the duties of the proffered position are similar to those described by the Department of Labor's *Occupational Outlook Handbook (Handbook)* for market research analysts. Counsel also states that the director found the duties to be those of a market research analyst, but then found that the

beneficiary would not actually perform those duties. Counsel asserts that the proffered position requires theoretical and practical application of a body of specialized knowledge. Counsel states that the director improperly found that the petitioner's type of business was relevant to whether the proffered position is a specialty occupation. The petitioner asserts that CIS made broad assumptions about the role of the proffered position within the petitioner's company, rather than relying on the duties of the position.

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 considered by the AAO when determining these criteria include: whether the *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In his denial, the director concluded that the record failed to establish that the petitioner's business was of a type to require a market research analyst. While the AAO concurs in the director's finding that the proffered position is not that of a market research analyst, as discussed below, it finds the director to have too narrowly defined the sectors of the economy that might require the services of a marketing research analyst. In that the 2004-2005 edition of the *Handbook* indicates that the work of marketing research analysts is concerned with the potential sales of a product or service and that they provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services, market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner's business develops, manufactures and distributes screen printing products does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of increasing its business opportunities and earnings. However, the petitioner's potential need to conduct market research does not establish the proffered position as a specialty occupation.

The record contains no work products or other documentation related to performance of the proffered position to support the contentions of counsel and the petitioner that performance of the position requires at least a bachelor's degree level of highly specialized knowledge, as required by statute and regulation, despite the fact that duties of the position are already being performed by the beneficiary and have been previously performed by the petitioner's president. Going on record without supporting documentary evidence is not sufficient for purposes 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).

The director found that the beneficiary would be performing the duties of a marketing manager, rather than those of a market research analyst. In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of market research analysts, as described at pages 173-174 of the *Handbook*. It has taken particular note of the following part of that discussion:

[M]arket 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 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. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The AAO finds that it is market research analysts' work in the design, development and supervision of original market research that sets this occupation apart from what might otherwise be characterized as a marketing manager position, employment that also requires the incumbent to conduct market research. Although the petitioner indicated that the beneficiary would conduct marketing research and formulate research methodology and data gathering methods, it offered no discussion of whether such research would be original in nature, nor the role of the beneficiary in carrying out such research. In the absence of such information, the analysis and research responsibilities described by the petitioner appear more closely related to the work of marketing managers, whose work is also focused on the marketing and selling of products and services. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers at pages 23-24 of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

...

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In

addition, they identify potential markets 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. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

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

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

. . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel states that the *Handbook* indicates that a market research analyst is a specialty occupation. The AAO agrees with counsel that a market research analyst is generally a specialty occupation, but in this instance, the proffered position is a marketing manager, despite the title the petitioner gives it. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Regarding parallel positions in the petitioner's industry, the petitioner submitted one newspaper advertisement for a marketing assistant for an aluminum/vinyl extruder with \$1 billion a year in sales, which required a bachelor's degree in marketing or communication. There is no evidence to show that the employer

issuing the advertisement is similar to the petitioner, or that the advertised position is parallel to the instant position. Thus, the advertisement has little relevance.

The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (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. While the petitioner states that its president previously performed the duties of the proffered position, it appears that the position as one with discrete duties is newly created, and the petitioner is not able to meet this criterion.

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

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, or its equivalent, 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. 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.