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U.S. Citizenship
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Services

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MAY 16 2005

FILE: EAC 03 054 51639 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner:

Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[Redacted Signature]

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

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 The AAO's previous decision is withdrawn. Upon consideration of the appeal, the director's decision will also be withdrawn and the petition will be remanded to the director for the entry of new decision.

The petitioner is a corporation engaged in the hospitality 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, 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 meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In its previous decision, dated October 15, 2003, the AAO summarily dismissed the appeal on the basis that counsel had failed to identify specifically any erroneous conclusion of law or statement of fact for the AAO's consideration. The AAO noted that counsel had not submitted a brief and/or evidence, although the Form I-290B indicated that he would do so within 30 days.

The matters submitted on motion establish that counsel had submitted a brief and additional evidence to the service center prior to the AAO's decision summarily dismissing the appeal. Therefore, the motion is granted, the previous decision is withdrawn, and the AAO will here enter a new decision based upon its consideration of the brief and additional evidence that counsel had submitted for the appeal but that had not been included in the record of proceeding when the AAO issued its previous decision.

The director erred in denying the petition on the basis of the specialty occupation issue, and, therefore, his decision must be withdrawn. However, because neither the director's decision nor his earlier request for additional evidence (RFE) addressed the issue of the beneficiary's qualifications to serve in the pertinent specialty occupation, the proceeding will be remanded to the director for the entry of a new decision after granting the petitioner a reasonable time to present additional evidence regarding the beneficiary's qualifications.

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 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 the accompanying copy of the section "Economists and Market and Survey Researchers" from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*.

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.

In his June 2, 2003 letter of response to the RFE, counsel provided the following list of duties and responsibilities proposed for the beneficiary:

1. The primary responsibilities of this position involves [sic] targeting and developing the customer base, improving sales and implementing marketing strategy for our hotel;
2. Develop and implement [a] marketing plan for the profitability of our hotel;
3. Design and develop and promote customer sales programs, packages, etc.;
4. Design and develop business from travel and convention related companies, tour operators, transportation companies, etc.;
5. Design, develop, direct and coordinate [an] effective advertising program;
6. Collection of local hotel market data, to wit: Lancaster city; research marketing condition in the local and regional areas to determine potential sales as well as development of research methods to gather data on competitors, [and] pricing of prevailing conditions;
7. Designing and conducting telephonic interviews, survey customer's preferences and recommend [sic] the management on the customer's preferences;
8. Preparing monthly sales reports of the hotel[,] showing sales volume and potential sales; advice [sic] the management as to how to improve the sales of the hotel;
9. Conduct qualitative and quantitative research to promote promotional program sales;
10. Conduct primary and secondary research to determine customer satisfaction levels, customer expectations, market conditions, company image, and [the] effectiveness of the petitioner[']s marketing strategies;
11. Research competitors including [their] pricing and features. Since there are about a dozen hotels/motels in Lancaster, and tremendous competition among the hotels/motels in this city.
12. Prepare and submit statistical reports, graphic illustrations of findings, and action plans recommended;
13. Establish research methodology, and design format for data gathering, such as surveys, opinion polls or questions.

These descriptions supplemented the following description of duties from the petitioner's letter of support that was filed with the Form I-129:

- a) Establish Research Methodology and Design Format for data gathering;
- b) Identify, examine, and analyze statistical data, forecast of market trends in [the] hotel/motel industry;
- c) Collection of market data;
- d) Monitoring market performance;
- e) Conducting profitability studies;
- f) Design graphs, tables and charts;
- g) Recommend [sic] the management on the pricing of the company services;
- h) Designing telephonic interviews, survey[ing] the consumer preferences;
- i) Researching economic trends;
- j) Research short and long term marketing decision of the company;
- k) Research marketing condition in the local and regional areas to determine the potential sales as well as the development of research methods to gather data on competitors, pricing of prevailing conditions;
- l) Providing information regarding promotion and pricing services to the management;
- m) Evaluation of hardware and software requirements for managing business and marketing of the business; and
- n) Preparing periodic sales reports showing sales volume and potential sales.

The AAO agrees with counsel that the director placed too much weight on the fact that the *Handbook* did not identify hotels among businesses that most often employ market research analysts, as the listing of the most common employers is not meant to exclude any business category from ever having a realistic need for such a position. Also, as noted by counsel, the size of the petitioner's business should not be a determinative factor. Nevertheless, the evidence of record does not establish that the beneficiary would be required to apply the level of research and analysis associated with the market research analyst occupation, which the *Handbook* indicates usually requires a master's degree. However, the totality of information about the proposed duties and the petitioner's business establishes a marketing position whose duties are sufficiently specialized and complex as to require knowledge that is usually associated with the attainment of at least a baccalaureate degree in marketing or a related specialty. Therefore, the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petition may not be approved however, as the evidence of record does not establish that the beneficiary is qualified to perform services in the proffered position in accordance with the regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D).

The documentary evidence of record about the beneficiary's qualifications consists of: (1) an evaluation of the beneficiary's education and work experience, rendered by International Credentials Evaluation and Translation Services (ICETS); (2) a diploma from the Maharaja Sayajirao University of Baroda for studies in accounting and auditing; (3) a January 1, 2002 note from a manufacturer of photographic accessories and display systems that states that the beneficiary "is a consultant to our firm, advising us in matters of Finance, marketing, and sales"; (4) an October 25, 2001 Certificate from Ganga Associates attesting that the beneficiary was this firm's Chief Marketing Executive for the period February 10, 1996 to August 21, 2001, and that he "possesses very good knowledge in Financial Management, Marketing, and Economics"; is "target-oriented"; guided the firm "for Promotion, Design and Pricing services"; was providing the firm "data on competitors and recent market trends and situations"; was "quick and perfect in taking decision"; and taught the firm "many things"; (5) an August 7, 2002 Certificate from a firm of chartered accountants that attests to the beneficiary's service as an "Articled Clerk" from August 1, 1974 to July 31, 1977, during which time he "completed required practical training of three years as per the rules of the Institute of Chartered Accountants of India [ICAI]; (6) a form from the ICAI Coaching Board that certifies that the beneficiary has completed a "course of Postal Tuition for the Intermediate Examination of the Institute"; (7) the beneficiary's license to act as an agent for the Life Insurance Corporation of India; (8) a form that attests to the beneficiary's having completed a two-day program on insurance in June 2000; (9) a form certifying that the beneficiary passed the Insurance Institute of India April 1988 examination for a Certificate in Insurance Salesmanship; (10) letters and certificates indicating that the beneficiary had been a qualifying member of the Million Dollar Round Table for the three years 1991-1993, apparently for insurance sales; (11) a December 28, 2001 Certificate from the Hotel Mamta that states that the beneficiary "is our Consulting Advisor since 1990"; (12) a January 10, 2002 memorandum from [REDACTED] that states that the beneficiary "is our Personal Advisor"; (13) a transcript of the beneficiary's marks at Maharaja Sayajirao University of Baroda; and (14) a Certificate from the university attesting that the beneficiary passed his examination in accounting and auditing.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The degree referenced by section 214(i)(1)(B) of the Act means one in a specific specialty that is characterized by a body of highly specialized knowledge that must be theoretically and practically applied in performing the duties of the proffered position. In the context of this particular proceeding, the degree must be at least a bachelor's degree in marketing or a related specialty.

In implementing 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C) states that an alien must meet one of the following criteria in order to qualify to perform services in a specialty occupation:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Only the fourth of the above criteria is relevant to the evidence so far presented.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) would require one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;¹
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on

¹ CIS will not accept a faculty member's opinion as to the college-credit equivalent of a particular person's work experience or training, unless authoritative, independent evidence from the official's college or university, such as a letter from the appropriate dean or provost, establishes that the official is authorized to grant academic credit for that institution, in the pertinent specialty, on the basis of training or work experience.

Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;²
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . .

The second and fourth criteria are not relevant: there is no evidence of college-level equivalency examinations, special credit programs, or certification or registration from a nationally-recognized professional association or society in the pertinent specialty.

The first and third criteria above preclude CIS from accepting that portion of the ICETS evaluation that is based upon the beneficiary's experience. This is because the evidence does not establish that the evaluator is, in the words of the first criterion, "an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience"; and, in accordance with the express language of the third criterion, CIS recognizes only so much of a credential evaluation service's opinion that is based upon a beneficiary's education alone. Accordingly, the AAO accepts only the ICETS conclusion that the beneficiary's foreign coursework at Maharaja Sayajirao University is the equivalent of "three years of academic study toward a Bachelor of Arts Degree from an accredited institution of tertiary education in the United States." In light of the fact that the proffered position requires a degree in marketing or a related specialty, the AAO also notes that none of the beneficiary's coursework was in marketing.

This leads to the question of the extent to which application of the fifth criterion to the evidence of record about the beneficiary's training and work experience may augment his three years of college-level credit. According to the express terms of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), to satisfy this criterion, a petitioner must demonstrate three years of specialized training and/or work experience for each year of college-level training the alien lacks. This provision imposes strict evaluation standards, stating:

[I]t must be *clearly demonstrated* [1] that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; [2] that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation;

² The petitioner should note that, in accordance with this provision, the AAO will accept a credentials evaluation service's evaluation of *education only*, not experience.

and [3] that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation³;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The letters, certificates, forms, and notes in the record about the beneficiary's training and work experience are too generalized to clearly demonstrate that his training and/or work experience (1) involved the theoretical and practical application of specialized marketing knowledge, (2) was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, and (3) led to the necessary recognition of expertise in the specialty.

As CIS had not previously questioned the beneficiary's educational qualifications, the petition will be remanded for the director to issue a request for additional evidence on whether the beneficiary possesses the credentials specified at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D). The director must afford the petitioner reasonable time to provide evidence pertinent to this issue, and any other evidence the director may deem necessary. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

ORDER: The AAO's September 14, 2004 decision and the director's October 15, 2003 decision are withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.