

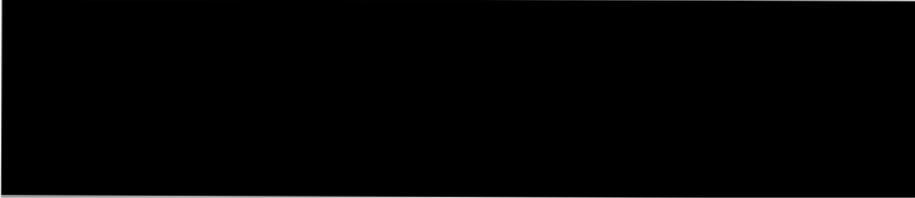


U.S. Citizenship
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FILE: EAC 04 045 52872 Office: VERMONT SERVICE CENTER Date: **DEC 11 2006**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, approved the December 5, 2003 nonimmigrant visa petition on December 24, 2003. Upon subsequent review, the director issued a notice of intent to revoke approval and ultimately revoked approval of the Form I-129 petition on April 8, 2005. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The approval of the petition will be revoked.

The petitioner claims to arrange trade shows and exhibitions for participating companies. It seeks to employ the beneficiary as a market research analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 record of proceeding includes: (1) the December 5, 2003 Form I-129 and supporting documents; (2) the director's December 16, 2003 request for further evidence (RFE); (3) counsel's December 18, 2003 response to the RFE; (4) the director's February 3, 2005 notice of intent to revoke approval of the petition (NOIR); (5) the petitioner's March 1, 2005 response to the NOIR and supporting documents; (6) the director's April 8, 2005 revocation decision; and (7) counsel's May 2, 2005 appeal brief and documents in support of the appeal. The AAO reviewed the record in its entirety before rendering its decision.

On April 8, 2005, the director revoked approval of the petition determining: that the petitioner was newly created; that the duties of the proffered position in relation to the petitioner's nature were not of H-1B caliber; and that the petitioner was not in business when the petition was filed. On appeal, counsel for the petitioner asserts that the proffered position of market research analyst qualifies as a specialty occupation and that the petitioner was conducting business when the petition was filed.

The AAO turns first to the question of the petitioner's status when the petition was filed on December 5, 2003.

On this issue the record contains the petitioner's registration with the State of New York on September 8, 2003, the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for the 2003 year showing a negative income of \$290,831 for the last few months of the year, bank statements for October and November 2003, telephone statements for services beginning in November 2003, a flyer inviting unnamed parties to attend a company introduction at a U.S. hotel on October 20, 2003, and invoices dated in October 2003 for services apparently related to initiating a website. These documents are sufficient to establish that the petitioner was setting up its business to organize exhibitions at the time the petition was filed December 5, 2003.

The petitioner also provides the following information to demonstrate that the petitioner was conducting business on December 5, 2003:

An agency agreement signed October 28, 2003 wherein the petitioner appointed an overseas agency to assist in developing its business in China and wherein it agreed to assist exhibitors with visas and business research;

A proposed agreement dated October 29, 2003 wherein an individual indicated interest in exhibiting luggage commodities;

An agency agreement signed November 6, 2003 wherein the petitioner appointed an overseas agency to assist in developing its business in China and wherein it agreed to assist exhibitors with visas and business research;

An agency agreement signed November 19, 2003 wherein the petitioner appointed an overseas agency to assist in developing its business in China and wherein it agreed to assist exhibitors with visas and business research;

A proposed agreement dated December 1, 2003 wherein an individual indicated interest in exhibiting bath and kitchen fixtures;

A proposed agreement dated December 1, 2003 wherein an individual indicated interest in exhibiting textiles; and

An agency agreement signed December 5, 2003 wherein the petitioner appointed an agency to assist in developing its business in China and wherein it agreed to assist exhibitors with visas and business research.

These documents demonstrate that the petitioner is making contacts and attempting to contract with and organize individuals and companies interested in exhibiting products in the United States. The petitioner stated in its December 16, 2003 letter in response to the director's RFE that it would be opening in April 2004 to provide exhibition and other related services. The record also contains the petitioner's letter of intent to lease space beginning in January 2004. Upon review of the totality of the record, the documentation provided is the type of documentation a business would normally generate during a start-up phase. Thus the petitioner in this matter has provided sufficient evidence that as a new business it would begin the process of hiring appropriate personnel to provide its business services. The director's inferences and determinations to the contrary will be withdrawn. Although the petitioner has provided evidence that it was in a start-up phase when the petition was filed, the petitioner must still establish that it will employ the beneficiary in a specialty occupation at the time of filing. *See* 8 C.F.R. § 103.2(b)(12).

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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.

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 above criteria 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 petitioner stated in its November 20, 2003 letter in support of the position that the beneficiary would assume the position of market research analyst and that the responsibilities of the position include:

- [R]esearching market conditions in local, regional, or national areas to determine potential sales of a product or service;
- [G]athering information on competitors about prices, sales, and methods of marketing and distribution; [and]
- [U]sing survey results to create a marketing campaign based on regional preferences and buying habits.

In a December 16, 2003 response to the director's RFE, the petitioner added that the beneficiary would research three fields within the company: Chinese research including identifying and choosing the Chinese companies to join the petitioner; American research including identifying and attracting American companies

as potential buyers; and competitor's research including analyzing where the competitors are located, their services, their strength and weakness, and their development trends. The petitioner noted that the qualified candidate for the proffered position would have good computer skills, an understanding of the Chinese and American markets, excellent communication, interpersonal, research analytical, and problem solving skills, as well as the ability to meet strict deadlines, attention to detail, experience in managing multiple assignments, and "consultative" skills.

In the petitioner's March 1, 2005 response to the director's NOIR, the petitioner stated the beneficiary's job duties are:

1. Research market conditions in local, regional, and national area to determine potential sales of product and service: 30%
2. Establish research methodology and design format for data gathering, such as surveys, opinion polls, and questionnaires; 5%
3. Examine and analyze statistical data to forecast future marketing trends; 8%
4. Gather data on competitors and analyze prices, sales, and methods of marketing and distribution; 25%
5. Collect data on customer preferences and buying habits; 20% and
6. Prepare reports of findings. 12%

The petitioner also noted that it had previously hired an individual for the position of market research analyst who had been promoted to the position of marketing director in November 2003 and that the employee previously in the position had obtained a bachelor's degree from a foreign university. The petitioner also attached several Internet job advertisements for the position of market researcher. The job advertisements included: (1) market research analyst for an exhibition center that provided a detailed description of the proposed duties of the position and indicated that a bachelor's degree is required; (2) a market analyst for a commodities sales center that provided a detailed description of the duties of the position and indicated that a bachelor's degree in social science, economics, or statistics is required; (3) a market research analyst position for a wholesale group that provided an overview of the duties required of the position and noted that the ideal candidate would have a bachelor's degree; (4) a market research analyst position for a consulting company that provided an overview of the duties required of the position, the copy of which in the record of proceeding redacted the level of education; and (5) a market analyst position for a direct selling center that did not provide a description of the duties of the position and did not include the required educational level.

On April 8, 2005, the director revoked approval of the petition determining that an individual with experience alone could perform the duties of the marketing research analyst in this matter and that the newly created petitioner could not offer specialty occupation employment, and that it was not clear that the petitioner was in business when the petition was filed.

On appeal, counsel for the petitioner repeats the description of the duties previously provided and lists the courses the beneficiary has taken. Counsel asserts that the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that a baccalaureate degree is a minimum requirement to perform the duties of a market research analyst and that the Department of Labor's *Dictionary of Occupational Titles (DOT)* assigns

a Specific Vocational Preparation (SVP) rating of 7 to the position of a market research analyst; thus a market research analyst position is a specialty occupation. Counsel references an unpublished decision for the proposition that a petitioner's size, scope, and newness is not relevant to a determination of granting an H-1B petition.

The *Handbook* states the following with regard to the employment of marketing research analysts:

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

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of 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 also might develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

* * *

Because of the applicability of market research to many industries, market research analysts are employed throughout the economy....

The *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs. It does not however, indicate that the degrees held by candidates must be in a field directly related to market research as required for classification as a specialty occupation. Accordingly, the title of market research analyst does not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). Moreover, the petitioner's description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention that it is offering the position of a market research analyst.

At the time of filing, the petitioner offered a generic description of the beneficiary's market research duties, one that appeared to describe the occupation of market research analyst rather than the proffered position. The director found this description insufficient to establish the position as a specialty occupation and asked for further information, specifically requesting a description of the beneficiary's typical workweek and a detailed statement articulating the beneficiary's proposed duties and day-to-day responsibilities, and the

percentage of time spent on those duties. In response, counsel provided a similarly generic description of the beneficiary's duties, only adding a percentage of time the beneficiary would spend on the various duties.

A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst gathers statistical data on competitors and examines prices, sales, and methods of marketing and distribution. Neither can the petitioner establish its employment as a specialty occupation by making conclusory statements regarding the position, rather than defining the activities associated with the position, for example, describing how the beneficiary assesses the market conditions for the petitioner. 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)). A generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in relation to its particular business interests.

The AAO acknowledges counsel's reference to the *DOT* and the SVP level of 7 for a market research analyst. However, the AAO does not consider the *DOT* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *DOT* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the occupation of a market research analyst would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty.

In the instant matter, the petitioner has not offered a description of the duties of its proffered position beyond a generalized outline. As previously noted, CIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The petitioner's description of the duties of its position is so generic that it is not possible to identify the actual daily duties required of the position and, therefore, whether the position meets the statutory definition of a specialty occupation, that is employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that the proffered position is a specialty occupation under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO examined the job announcements the petitioner provided to establish the petitioner's degree requirement as the norm within its industry. However, the job announcements submitted do not show that the advertising businesses are similar to the petitioner in size, number of employees, or level of business, nor can the job descriptions provided by these listings be established as parallel to the nonspecific job description

provided for the proffered position. Moreover, as the record does not establish the actual duties of the position as it relates to the petitioner's business, it precludes the petitioner from demonstrating that the proffered position is parallel to any degreed position within similar organizations in its industry. A review of the totality of the job announcements, the job descriptions contained therein, and the type of organizational entities advertising the positions, does not demonstrate that the proffered position is parallel to positions offered by organizations similar to the petitioner, which require a bachelor's degree in a specific specialty.

Likewise, the petitioner's assertion that it had previously employed an individual in the proffered position, who had been promoted to the position of marketing director in November 2003 and that the employee previously in the position had obtained a bachelor's degree from a foreign university is not substantiated in the record. The petitioner does not provide documentary evidence of the prior employee's academic credentials. In addition, absent a meaningful description of the position's duties, the prior employee's performance of similar duties would not establish the position as a specialty occupation.

Counsel's reference to an unpublished decision is not probative. Counsel has not furnished evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Upon review of the totality of the evidence submitted in support of the petition, the petitioner failed to establish that the proffered position is a specialty occupation. Although the petitioner has submitted evidence to show that it was starting a business when the petition was filed, it has not submitted sufficient evidence to define the proffered position as a specialty occupation or otherwise establish the proffered position as a specialty occupation when the petition was filed. Accordingly, the AAO shall not disturb the director's revocation of the approval 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 approval of the petition is revoked.