

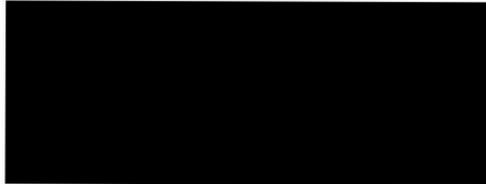
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



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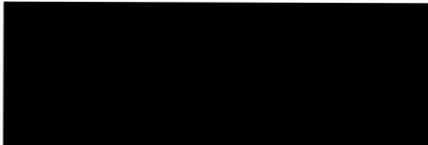
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FILE: WAC 07 196 50591 Office: CALIFORNIA SERVICE CENTER Date: **AUG 04 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 engaged in the wholesale distribution of handbags. It was established in 2006, employs three persons, and in 2006 had a gross annual income of \$870,975, and a net annual income of negative \$26,499. It seeks to employ the beneficiary as a market research analyst. Accordingly, 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).

On November 21, 2007, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On appeal, the petitioner submits a brief and additional documentation.

The record includes: (1) the Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel for the petitioner's response to the director's RFE; (4) the director's denial decision; and, (5) the Form I-290B, counsel's brief, and documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

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.

Consistent 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.”

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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently 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. Applying this standard, USCIS 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. However, to determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

In the director's November 21, 2007 decision, the director determined that the petitioner did not have the organizational complexity to credibly offer the position of market research analyst to the beneficiary. The director noted that the petitioner did not have a sales division or sales representatives and questioned whether the petitioner engaged in the type of business for which a market research analyst would typically be required on a regular full- or part-time basis. The director found that the proffered position would more likely be that of a marketing manager, an occupation that is not a specialty occupation.

On appeal, counsel for the petitioner asserts that the director inappropriately relied upon the petitioner's small number of employees to determine whether the petitioner's "market research analyst" position existed. Counsel contends that both large and small businesses need the information provided by market research. Counsel cites *Young China Daily, et al v. Lois C. Chappell, et al.* at 742 F. Supp. 552 (N.D. Cal 1989) for the proposition that the size of a business has no rational relationship to the need for a professional. Counsel also acknowledges that the same Court held in pertinent part that "...it is the duties themselves rather than the size of the employer which is relevant." Counsel also provides an excerpt from the California Employment Development Department's occupational guide regarding market research analysts and an opinion prepared by [REDACTED] Professor of Accounting and Taxation, School of Business Administration, University of San Diego. [REDACTED] opines that it is necessary and appropriate for small companies to employ experts in marketing analysis.

Before discussing the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this matter, the AAO will address a preliminary issue, namely, the director's statement that the 2006-2007 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* indicates that the Market Research Analyst occupational category qualifies as a specialty occupation.

The AAO disagrees with, and thus withdraws, the director's statement that the 2006-2007 edition of the *Handbook* indicated that the Market Research Analyst occupational category qualifies as a specialty occupation. While the 2006-2007 edition of the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a

specialty occupation. This is evident in comparing the first and third of the three Significant Points that introduces the 2006-2007 *Handbook's* chapter "Market and Survey Researchers":

- Market and survey researchers need at least a bachelor's degree, but a master's degree may be required for employment; continuing education also is important.
- Employment is expected to grow faster than average.
- Job opportunities should be best for those with a master's or Ph.D. degree in marketing or a related field and strong quantitative skills.

That the 2006-2007 edition of the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers":

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions, and increases opportunities for advancement to more responsible positions. Also, continuing education is important in order to keep current with the latest methods of developing, conducting, and analyzing surveys and other data. Market and survey researchers may earn advanced degrees in business administration, marketing, statistics, communications, or some closely related discipline. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Many corporation and government executives have a strong background in marketing.

The AAO also notes that while it is reasonable to assume that the size of an employer's business has an impact on the duties of a particular position, it is the duties of the position as those duties relate to the nature of the petitioner's business that are most relevant. *See Young China Daily, et al v. Lois C. Chappell, et al.* at 742 F. Supp. 552 (N.D. Cal 1989); *EG Enterprises, Inc. d/b/a/ Mexican Wholesale Grocery v Department of Homeland Security*, 467 F. Supp. 2d 728 (E.D. Mich. 2006). As will be discussed below, the director in this matter correctly determined that the petitioner had not established that the duties of the proffered position comprise the duties of a specialty occupation.

The director's discussion regarding the size of the petitioner is withdrawn. The AAO will now discuss and evaluate the evidence of record.

On the Form I-129, the petitioner stated that the proffered position is that of a "market research analyst." The petitioner provided excerpts from the *Handbook* and the Department of Labor's *O*NET Online (O*NET)* regarding the occupation of market research analyst. The petitioner did not provide a description of the duties of the proffered position. On August 29, 2007 the director requested further evidence to establish that the petitioner's proffered position is a specialty occupation. In the October 12, 2007 letter submitted in response to the RFE, counsel paraphrased or cited verbatim several of the duties set out in the *O*NET's* overview of the occupation of a market research analyst.

The AAO observes that counsel's October 12, 2007 letter neither explains nor is accompanied by documentary evidence showing the particular methodologies and analytical tools that the beneficiary will employ or are usually associated with at least a bachelor's degree in a specific specialty. The AAO also finds that the beneficiary's duties are so abstractly stated in the letter that they do not convey the specific nature of the work that he would actually perform and, therefore, do not indicate the nature and level of education that the work requires. The AAO does not consider a recitation of an abstract list of responsibilities as definitive of a petitioner's specific proffered position. The petitioner cannot repeat portions of the generalized descriptions found in the *O*NET* or other sources describing occupations to establish its proffered position as a specialty occupation. Such generalized descriptions are 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, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline counsel provided in response to the director's RFE.

Counsel also provided a September 26, 2007 opinion letter prepared by [REDACTED] Associate Professor of Management Science, Robert H. Smith School of Business, University of Maryland, College Park, Maryland. In the September 26, 2007 letter, [REDACTED] recited a portion of counsel's description of the duties of the proffered position and added other duties listed in the *O*NET's* overview of the occupation but not included in counsel's description of the duties the beneficiary would be required to perform. [REDACTED] stated: "[a]fter examining the responsibilities of this Market Research Analyst position in detail, it becomes apparent that a minimum of a Bachelor's Degree in Marketing, Business Administration, or a closely related field provides the student with the core competencies and skills needed for a Market Research Analyst position." [REDACTED] further opined: "that these duties are specialized and require the theoretical and practical application of a body of highly specialized knowledge" and "that it is standard for a company such as [the petitioner] to hire a Market Research Analyst and require that individual to have attained at least a Bachelor's Degree." [REDACTED] adds that it is "the industry standard for a position such as Market Research Analyst for [the petitioner] to be filled through recruiting a college graduate with the minimum of a Bachelor's Degree in Marketing, Business Administration, or a closely related field."

The AAO observes that [REDACTED] did not review the same general description presented by petitioner's counsel, thus his opinion is significantly diminished in probative value. Moreover, Dr. [REDACTED] does not consistently state that the market research analyst position for the petitioner would require the successful candidate to have a bachelor's or higher degree in a specific discipline. Further, [REDACTED] has not substantiated his opinion with a factual foundation. [REDACTED] does not disclose that he interviewed the petitioner, that he visited the petitioner's business, or reviewed documentary evidence regarding the petitioner's business. [REDACTED] does not provide sufficient details about the complexity of the duties in relation to the petitioner's wholesale handbag distribution business to substantiate his conclusions. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The evidence of record does not demonstrate that the generically stated proposed duties require a baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), 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.

Even if the generic statements that comprise the information about the proffered position and its duties were sufficient to align the position with the broad occupational category of Market Research Analysts as discussed in the *Handbook*, this position has not been established as a specialty occupation. As already indicated in the discussion of the 2006-2007 *Handbook*, employers of market research analysts do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty. This fact is also clear in the following excerpt from the "Training, Other Qualifications, and Advancement" section 2008-2009 *Handbook's* chapter "Market and Survey Researchers, which indicates that a major or concentration in a specific specialty is not a normal aspect of the baccalaureate threshold for entry into the market-research-analyst occupation:

Training, Other Qualifications, and Advancement

A bachelor's degree is usually sufficient for entry-level market and survey research positions. Higher degrees may be required for some positions, however. Continuing education and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also is important for advancement.

Education and training. A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social

science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable later in obtaining a fulltime position in the field, because much of the initial work may center on these duties. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

As the *Handbook* indicates that entry into the market-research-analyst occupation may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, market research analyst positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular market-research-analyst position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, it is incumbent on the petitioner to establish that its particular position is one 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. In this matter, the petitioner has failed to do so.

As the evidence of record does not establish that the particular position proffered here is one 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, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, which 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.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The AAO has again analyzed [REDACTED] opinion as well as that of [REDACTED] opinion submitted on appeal to determine whether either letter sufficiently discusses the occupation of market research analyst and any industry standards requiring that such a position would require a four-year course of study in a specific discipline. Neither opinion letter contains sufficient substantive information to overcome the *Handbook's* report that market research analysts are not required to obtain a bachelor's degree in a specific discipline. The expert opinions provided by counsel, while relevant to these proceedings, are also insufficient to overcome the *Handbook's* information on the educational requirements imposed by employers on market research analysts. Neither is supported by the type of documentation necessary to establish the writer's authority to speak to nationwide hiring practices in this area. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *See 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)).

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for market research analyst positions, including degrees not in a specific specialty related to market research analysis. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved 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. As reflected in the earlier discussion of the limited information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

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.

Beyond the decision of the director, the AAO finds that the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner submitted evidence that the beneficiary obtained a Bachelor of Science Degree in Business Administration; however a degree in business administration alone is insufficient to qualify the beneficiary to

perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The beneficiary's coursework must indicate that he or she obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). In this matter, the petitioner has not provided copies of the beneficiary's transcripts or other evidence substantiating that the beneficiary would be qualified to perform the duties of any occupation that is considered a specialty occupation. For this additional reason, the petition will not be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Upon review of the totality of the record, the petitioner has not provided evidence that the proffered position is a specialty occupation. The petition will be denied and the appeal dismissed for the above stated reasons. 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.