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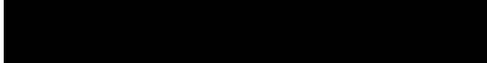
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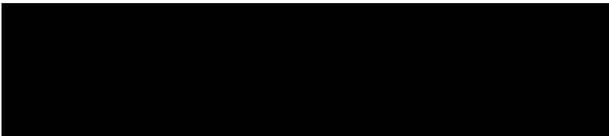


FILE: WAC 08 005 51310 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2009**

IN RE: Petitioner: 
Beneficiary: 

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 a garment manufacturer. It seeks to employ the beneficiary as a market research analyst 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 he determined that the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE) dated October 25, 2007; (3) the petitioner's response to the director's RFE received on October 31, 2007; (3) the director's denial letter dated November 2, 2007; and (4) Form I-290B, with counsel's brief and additional evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

United States Citizenship and Immigration Services (USCIS) 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, 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, 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’s letter of support, dated September 27, 2007, indicates the proffered position would require the beneficiary to:

1. Research economic trends, short term and long term marketing decisions of company, as well as marketing conditions in local, regional and national areas;
2. Development of research methods to gather data on competitors, pricing and prevailing conditions;
3. Responsible for analyzing research result and preparing reports to management[;]
4. Analyzing current company’s business positioning and marketing in the United States;
5. Developing, executing and integrating all appropriate marketing disciplines including advertisement, direct marketing, promotions and public relations;
6. Leading development and production of promotional materials;
7. coordinating internal processes so that the company’s service can be delivered on time and within budget;
8. Overseeing business and technical prioritization sessions at the managerial level;
9. Coordinating product rollout and communicating release schedule to existing and potential customers;
10. Analyzing marketing data;

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11. Develop, [execute] and integrate an appropriate international marketing plan which will include advertisements, direct marketing, promotions and public relations;
12. Develop promotional materials geared towards the United States and Asia;
13. Coordinate internal processes so that our service can be brought [to] a higher level on the domestic and international market on time and within budget;
14. Oversee various business relationships abroad.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 Department of Labor's *Occupational Outlook Handbook (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, relying on the 2006-2007 edition of the DOL *Handbook*, concluded both that the duties of the proffered position were not those of a market research analyst and that the record failed to establish that the petitioner's business was of the type or complexity and scope to require a market research analyst. As discussed below, the AAO concurs in the director's finding that the proffered position is not that 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 or marketing research analysts, as described by the 2008-2009 edition of the *Handbook*. It has taken particular note of the following section 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.¹

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 marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicated that the beneficiary would be heavily involved in research related to expanding its business – the analysis of its sales and marketing records, the compilation of research on its competitors, the compilation of market data and the survey of customer buying habits – the beneficiary's market research

¹ *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos013.htm.

responsibilities do not make him a marketing research analyst. The issue is not whether the proffered position requires the beneficiary to do market research, which it does, but whether it is that of a marketing research analyst and, more importantly, whether it requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through 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. As the petitioner does not indicate that the proffered position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, the proffered position is not that of a marketing research analyst.

Instead, like the director, the AAO finds the proffered position's duties to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies. As discussed in the *Handbook* within the occupation of advertising, marketing, promotions, public relations and sales managers:

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 users²

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.

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.

² *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos020.htm

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 specialists³

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.

The director also examined the complexity of the petitioner's organization in rendering the decision and, on appeal, counsel contends that the director ignored the petitioner's organizational chart which clearly demonstrated a marketing department within the petitioner. While the AAO notes that the chart does indicate that the beneficiary would work in the division entitled "market research," the fact remains that, at the time of filing, there were no other sales associates or marketing personnel on staff at the petitioning entity. Therefore, the AAO concurs with the director's finding that the petitioner does not have the staffing to implement marketing or sales campaigns based on the research which would allegedly be performed by the beneficiary.

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).

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. The petitioner has submitted no evidence to establish its degree requirement as an industry norm, such as job advertisements for employment related to market research analysis in similar companies. Accordingly, the petitioner has failed to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held

³*Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos020.htm.

the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's request for evidence, the petitioner asserted it imposed a degree requirement on its entire professional staff and listed the names and positions of its four employees, all of whom hold baccalaureate degrees. On appeal, the petitioner again asserts that all of its employees possess a baccalaureate degree in their area of expertise, or the equivalent in experience, and notes the documentation it has submitted to establish its normal employment practices. The AAO has reviewed the documentation provided by the petitioner regarding its employment practices.

While the documentation submitted by the petitioner suggests its employment of individuals possessing degrees, it is insufficient to prove that the petitioner normally requires a degree for the proffered position. The petitioner acknowledges that it had not previously hired a person holding a baccalaureate degree to fill the position currently offered to the beneficiary. Despite claiming to hire only individuals who hold baccalaureate degrees to staff its company, the fact that the petitioner has no history of hiring a market research analyst cannot establish that the petitioner's normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has asserted that the duties of its proffered position – the identification of industry trends and consumer behavior based on complex market data and the development of marketing strategies to target consumers – would require the beneficiary to conduct economic research, statistical analyses and estimations, budgeting and forecasting, and econometric techniques. Such knowledge, it contends, comes only from a baccalaureate degree in economics or a closely related field. The AAO does not agree.

Upon review of the duties of the proffered position, the AAO has concluded that the position is most closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.