

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Room A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

DI

FILE: WAC 02 122 53617

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 04 2005**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The 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 "staffing firm" that specializes in placing health-care professionals into temporary employment positions. It seeks 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 (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation and because the petitioner did not establish, vis-à-vis the beneficiary, whether it would act as an employer or agent for other employer(s). On appeal, counsel represented that it would submit a brief within 30 days of filing Form I-290B, but to date no further documentation has been received. The record is complete.

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 an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a 20-hour-a-week marketing research analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail collecting market research data for delivery to company officials; maintaining files on national, regional and local competitors; developing promotional strategies, and formulating advertising campaigns. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree, or its equivalent, in marketing, economics, or a related field.

The director found that the proffered position was not a specialty occupation because the job is not clearly that of a market research analyst; it appears to include duties pertaining to the position of marketing manager. In addition, the director noted that the petitioner had not shown that it requires the services of a market research analyst. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the petitioner would restrict the beneficiary's duties in the proffered position to working for the petitioner and would not be "outsourced to clients outside the petitioner's work site;" nor does the proffered position depend on having "outside clients." Counsel further disputed the director's finding that the job duties match those of Marketing Manager as detailed by the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Counsel asserts that "the type of work required by the position is not simply clerical in nature and can not be performed by an individual lacking a bachelor's degree, or equivalent thereof, in marketing, economics or related discipline." Nevertheless, upon review of the record, it is determined that the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria 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. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is primarily that of a market research analyst. According to the *Handbook*, "a market and survey researcher analyzes statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales and methods of marketing and distribution." The petitioner has submitted no duties describing the research of the market sector

the job would entail, whether in the field of temporary employment of health-care workers or in some other. On the other hand, the role of a market research manager is more in line with that of the petitioner's. Its practitioners determine the demand for products and services offered by the firm and its competitors, identify markets and promote the firm's product to potential users. A review of the marketing manager job description in the *Handbook* confirms the accuracy of the director's assessment to the effect that, the job duties parallel those responsibilities of a marketing manager. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty is required for a marketing manager job. The *Handbook* indicates a wide range of educational backgrounds can qualify one for entry into the occupation.

Regarding parallel positions in the petitioner's industry, the petitioner submitted several Internet job postings for market analysts. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Thus, the advertisements have little relevance. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The record does not indicate that the petitioner previously hired anyone for the proffered position; thus, this criterion has not been met. Created in 2001, the petitioner's current employment roster includes only two employees; the petitioner has submitted no evidence of previous hires to a position similar to that proffered the beneficiary.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Despite counsel's assertions to the contrary, to the extent depicted in the record, the job duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's reasons for his denial of the petition.

The director also determined that the petitioner had not established that it would act as the beneficiary's employer rather than as agent for the actual employer. The director found from the evidence that the petitioner places nurses and others with employers. The director found that the petitioner had not complied with the regulation governing agents as petitioners, at 8 C.F.R. § 214.2(h)(2)(i)(F).

In response to the Request for Evidence, counsel, expanding on the initial job description, stated that the position would be strictly in-house, working at the petitioner's corporate headquarters under the supervision of one of the other two company employees. The beneficiary "will not be placed in any temporary assignment

with our client employers,” and his duties would “not require him to travel to client employers’ sites. Counsel estimated 30 percent of the job was designing the research, 40 percent was analysis and reporting, and the rest was “project execution.” The record also contains an employment agreement between the beneficiary and the petitioner. The petitioner has established that it will be the employer of the beneficiary. Nevertheless, it has failed to establish that the position is a specialty occupation.

Beyond the decision of the director, the petitioner failed to obtain a certified Labor Condition Application (LCA) as required. The provisions of 8 C.F.R. § 214.2(h)(4)(i)(B) list the requirements for petitioner involving a specialty occupation:

- (1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The present petition was filed February 22, 2002. Subsequent to the filing of the petition, the petitioner was requested to submit evidence that it had obtained a certified LCA, from the Department of Labor, before the petition was filed. In response, the petitioner submitted the Form ETA 9035 certified by the DOL on February 25, 2002, or approximately three days after the petition was filed. Consequently, the petitioner did not provide evidence that the Department of Labor had certified the LCA before the petition was filed. For this additional reason, the petition will be denied.

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.