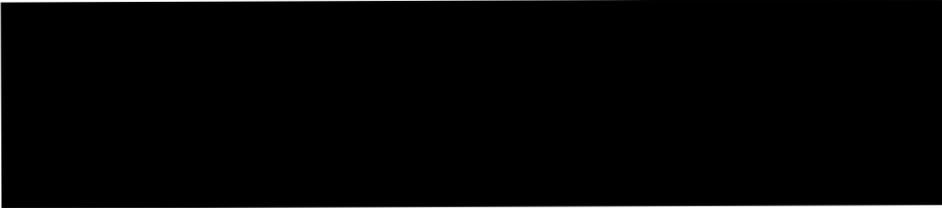


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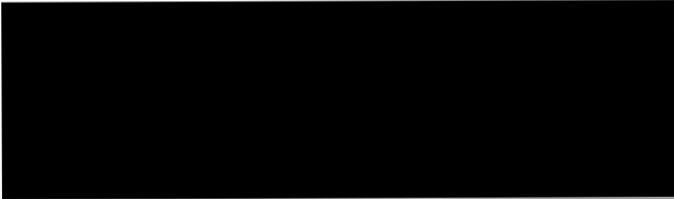
FILE: EAC 04 254 53420 Office: VERMONT SERVICE CENTER Date: JUN 22 2006

IN RE:



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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is mortgage company. It seeks to employ the beneficiary as a marketing manager and to classify him 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 on the ground that the proffered position is not 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.

As provided in 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 decision; and (3) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

In the Form I-129 and an accompanying letter the petitioner described itself as a mortgage provider catering mostly to the Hispanic community in the Washington, D.C. metropolitan area. The petitioner

stated that it was established in 2004, had three employees and gross annual income of \$600,000, and proposed to hire the beneficiary as a marketing manager for three years at an annual salary of \$42,000. The proffered position was described as follows:

The position of marketing manager requires a strong background in marketing and communications. In order to . . . create and . . . implement a marketing strategy, a marketing manager must have a strong knowledge of marketing strategy planning, advertisement, communication principles and various marketing structures. The position requires knowledge of advertising tactics ranging from print ads to all multimedia and visual advertisements and outreach programs. This marketing might include radio and/or television advertisements depending on what [is] most appropriate after analyzing market research and conducting cost analysis reviews. Logo design, targeted mailings, graphic design for coupons and flyers will also be some of the duties assigned to the marketing manager. Other duties will include conducting periodic cost analysis reviews to gauge advertising price adequacy and recommend[ing] modifications to pricing plans. Additionally, internal marketing will be evaluated in terms of existing client targeting. Further duties will include researching and carrying out sponsorship of community groups and events on behalf of the mortgage firm. Cyber marketing will also have to be addressed in terms of analyzing whether to create a website, conducting email campaigns and obtaining listings on recognized Internet mortgage and real estate directories. Finally, results analysis will be an integral part of the marketing manager's position as a multifaceted marketing strategy is finalized.

The beneficiary qualifies for the position, the petitioner declares, by virtue of his master's degree in marketing from the Central University in Venezuela, granted in December 2001, which followed a bachelor's degree in biology from the same university in July 1989. According to the report of a foreign educational credentials evaluation service in Herndon, Virginia, the beneficiary's degrees are equivalent to a bachelor's degree in marketing from an accredited university in the United States.

In her decision the director determined that the duties of the proffered position are closer to those of a market research analyst, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, rather than those of a marketing manager. Nevertheless, the director found that the position could not be classified as a market research analyst, among other reasons because the petitioner is not engaged in the type of business, according to the *Handbook*, that would normally employ a market research analyst. The director concluded that the evidence of record did not establish that the proffered position meets the statutory and regulatory criteria of a specialty occupation.

On appeal counsel asserts that the director should have issued a request for evidence (RFE) or a notice of intent to deny (NOID) before issuing a decision because the beneficiary was not clearly ineligible for H-1B classification. Counsel submits an interoffice memorandum from William R. Yates, Associate Director of Operations, to CIS Regional, Service Center, and District Directors and Officers-in-Charge, dated February 16, 2005, on "*Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*," HQOPRD 70/2, which "strongly recommend[s]" that a RFE or a NOID be issued "when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility." Whether the proffered position is classified as a market research analyst or a marketing manager, counsel contends, both have been found in the past to be specialty occupations. Counsel submits the petitioner's

advertisement for the proffered position in the Washington Post, which states that a degree in marketing or business is required, as well as a series of internet job postings for marketing manager positions as further evidence of a common degree requirement in the industry.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The regulation at 8 C.F.R. § 103.2(b)(8) requires the director to issue a request for evidence in "instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing." *Id.* The director is not required to issue a request for further information in every potentially deniable case. If the director determines that the initial evidence supports a decision of denial, the cited regulation does not require solicitation of further documentation. The director did not deny the instant petition based on insufficient evidence of eligibility. Furthermore, even if the director had committed a procedural error by failing to solicit further evidence, it is not clear what remedy would be appropriate beyond the appeal process itself, which is a *de novo* proceeding. The petitioner has in fact supplemented the record on appeal. It would serve no useful purpose, therefore, to remand the case to the director simply to afford the petitioner the opportunity to supplement the record with new evidence.

The AAO does not agree with the director's finding that the duties of the proffered position are closer to those of a market research analyst than a marketing manager. In accord with the petitioner's title for the position, the AAO determines that the duties of the position reflect the DOL *Handbook's* description of a promotions and marketing manager, which are subcategories of the *Handbook's* broad occupational category of advertising, marketing, promotions, public relations, and sales managers. As described in the *Handbook*, 2006-07 edition:

Promotions managers . . . direct promotion programs that combine advertising with purchase incentives to increase sales. In an effort to establish closer contact with purchasers – dealers, distributors, or consumers – promotion programs may use direct mail, telemarketing, television or radio advertising, catalogs, exhibits, inserts in newspapers, Internet advertisements or Web sites, in-store displays or product endorsements, and special events. Purchasing incentives may include discounts, samples, gifts, rebates, coupons, sweepstakes, and contests.

Marketing managers develop the firm's marketing strategy in detail. [T]hey estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets – for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are

satisfied. . . . [T]hey monitor trends that indicate the need for new products and services and they oversee product development

With respect to the educational requirements of the occupation, the *Handbook, id.*, states the following:

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 plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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.

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel

As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal, industry-wide requirement for entry into a promotions or marketing manager position. While some employers may prefer a business degree with an emphasis on marketing, many employers give favorable consideration to a broad spectrum of degrees in hiring for such positions. Thus, a promotions and marketing manager does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into such a position.

In regard to the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the record includes eight internet job postings for marketing manager positions. Four of the advertisements state that a bachelor's degree is required for the position, without identifying a specialty field, and another states that relevant experience is required, without indicating any degree requirement. One advertisement requires a marketing degree or equivalent experience. Another states that a bachelor's degree is required, but is unspecific about the area of specialty, indicating that a marketing, business, finance, engineering or computer science concentration is preferred. Only one of the advertisements states that a bachelor's degree in marketing or a related specialty is required for the position. Furthermore, none of the advertising companies appear to be similar to the petitioner in size or scale of operations. Thus, the job postings in the record do not establish that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. The evidence of record indicates that the scope and complexity of the position are in line with those of a typical promotions or marketing manager, for which a specialty degree is not required. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the proffered position is newly created. Though the newspaper advertisement for the position states that a bachelor's degree in marketing or business is required, the petitioner has no history of requiring a

specialty degree or its equivalent for the position. Accordingly, the petitioner cannot demonstrate that it normally requires a specialty degree or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. The evidence does not demonstrate that the duties of the position are more specialized and complex than those of a typical promotions or marketing manager. As the DOL *Handbook* indicates, baccalaureate level knowledge is not normally required for such positions. The AAO concludes, therefore, that the proffered position does not require baccalaureate level knowledge in a specific specialty, as required for it to meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel cites previous service center and AAO and decisions in which a marketing manager was determined to be a specialty occupation. None of those decisions is binding on the AAO's adjudication of the instant petition. Only published precedent decisions are binding on all CIS employees in the administration of the Act. See 8 C.F.R. § 103.8(d). Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). The current petition cannot be approved, therefore, unless the evidence of record establishes current eligibility. The record in this proceeding does not establish that the proffered position meets the statutory and regulatory requirements of a specialty occupation.

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.