

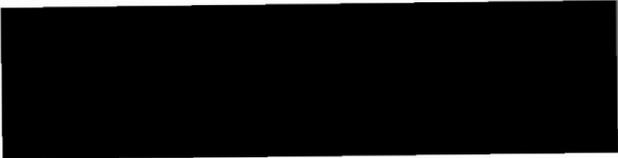


U.S. Citizenship
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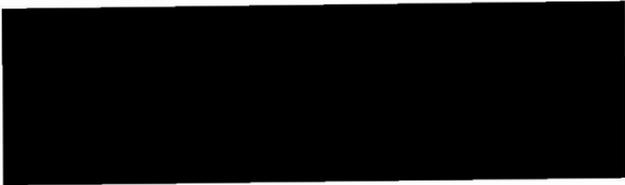


FILE: WAC 07 146 51256 Office: CALIFORNIA SERVICE CENTER Date: NOV 10 2008

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

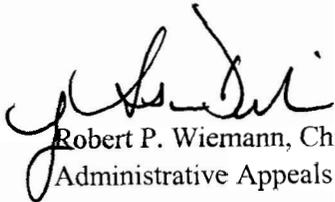
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 of 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 an information technology business that seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, 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, determining that the petitioner had not established that the proffered position is a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

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

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) consistently 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 petitioner seeks the beneficiary’s services as a market research analyst. In a March 30, 2007 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered market research analyst position as follows:

- Conduct primary and secondary research including survey design and primary data collection (15%);
- Conduct and manage web-based and telephone surveys of various groups (10%);
- Use a range of statistical techniques including cluster, factor, discriminate, strategic choices and conjoint to segment multiple data sets (35%);
- Identify need and scope for primary and secondary market research, as well as provide analysis and synthesis on a wide variety of market analysis and planning projects (15%);
- Manage the administration and evaluation process, and create actionable reports and analysis on consumer insight and understanding (10%);
- Interact daily with consultants on progress and status (10%); and
- Prepare monthly financial statements with executive-level analysis of results and compilation of quarterly forecasts and annual budget (5%).

The director found that the proffered position is primarily that of a marketing manager. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2006-07 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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, in part, that the proffered position is that of a market research analyst for the petitioner, which is a computer systems design and related services provider. Counsel also states that the petitioner's size is irrelevant and that the proffered position meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): a bachelor's degree is the minimum industry requirement for entry into this occupation. Counsel also states that a specialty degree and information technology knowledge are necessary for the thorough analysis of market opportunities for the petitioner's new "Archiving Solutions Product." As supporting documentation, counsel submits the following: the petitioner's certificate of incorporation and other business-related documentation; the petitioner's website printouts and advertising material; the petitioner's lease agreement and related photos; the petitioner's federal income tax return for 2006 and quarterly federal tax returns for the first two quarters of 2007; and excerpts from the DOL's *Handbook*, *Online Wage Library*, and *America's Career InfoNet*.

Preliminarily, counsel's interpretation of the *O*Net* is not persuasive that the proffered position is a specialty occupation. The *O*Net* does not indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. The *O*Net* 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. The SVP rating does not describe how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. In particular, the AAO notes that the *O*Net* Job Zone Four designation does not specify a degree in a related specialty as a characteristic of occupations encompassed by this category. The *O*Net* OnLine Help site also states that an SVP rating indicates years of specific vocational training that may be attained in a variety of ways other than formal education.

Counsel's reference to and assertions about the relevance of information from *America's Career InfoNet* are also not persuasive. The *America's Career InfoNet* "Occupation Report" is not based upon the statutory and regulatory criteria for specialty occupations that govern this proceeding. Furthermore, this document does not specify a bachelor's degree in a specific specialty. Accordingly, the fact that a "Bachelor's or higher degree" is described as the "Education or Training" for marketing managers in the State of Illinois is not probative.

Upon review of the record, 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While a review of the Market and Survey Researchers category in the 2008-09 *Handbook* finds that market research analysts are employed throughout the economy, the AAO does not concur with counsel that the proffered position is a specialty occupation, as the *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for a market research analyst position. While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not provide a description of duties in a market research analyst-related field that would require a master's degree, as described in the *Handbook*. Moreover, the duties of the proffered position, such as "[using] a range of statistical techniques including cluster, factor, discriminate, strategic choices and conjoint to segment multiple data sets" and "[identifying the] need and scope for primary and secondary market research, as well as providing analysis and synthesis on a wide variety of market analysis and planning projects", are only generally and generically described. They do not convey the substantive work that would be required of the beneficiary. Further, although counsel asserts on appeal that a specialty degree and information technology knowledge are necessary for the thorough analysis of market opportunities for the petitioner's new "Archiving Solutions Product," the AAO notes that, at the time the petition was filed, and in response to the RFE, neither counsel nor the petitioner made any reference to the beneficiary's marketing duties associated with this project. A review of the "Project Document: Archive Product Solution" also finds no mention of the beneficiary's involvement in this project. A petitioner may not change the proffered position in material ways at the time of the appeal. CIS may not approve a petition if the facts that existed when the petition was filed have materially changed. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The record contains insufficient evidence regarding parallel positions in the petitioner's industry. The record also does not include sufficient evidence from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment as a marketing manager. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a

specific specialty. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. Counsel does not address this issue on appeal. The evidence of record does not establish this criterion. In addition, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel asserts that a specialty degree and information technology knowledge are necessary for the thorough analysis of market opportunities for the petitioner's new "Archiving Solutions Product." As indicated in the discussion above, the record of proceeding lacks evidence of specific duties that would establish such specialization and complexity and, at the time the petition was filed, and in response to the RFE, neither counsel nor the petitioner made any reference to the beneficiary's marketing duties associated with this project. The petitioner's "Project Document: Archive Product Solution" submitted on appeal also does not provide any specific details concerning the beneficiary's involvement in this project. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree 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.

In view of the foregoing, the petitioner has not overcome the director's objection. For this reason, the petition may not be approved.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the equivalent of a Bachelor of Science degree with a dual major in finance and computer science, from an accredited college or university in the United States. The evaluation, however, is based upon the beneficiary's formal education and computer training. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Moreover, although the evaluator asserts that the National Institute of Information Technology (NIIT) is accredited through the American Council on Education, the record contains no evidence that the NIIT is either recognized or accredited as an institution of higher education in India.¹ The record also contains no evidence in support of the evaluator's assertion that the particular ICFAI University where the beneficiary completed "a sequence of advanced post-secondary programs in finance" is a recognized institution of higher education in India.² Thus, the evaluator's conclusion about the beneficiary's educational equivalency is not probative. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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

¹ It is also noted that NIIT does not appear on the Electronic Database for Global Education (EDGE) website at <http://aacraoedge.aacraoedge.org> as an accredited institution.

² It is also noted that the website at <http://en.wikipedia.org/wiki/ICFAI> reports: "Icfai has promoted and sponsored seven Universities spread over different states in India. Out of these, only two universities, namely, Icfai University, Uttarakhand and Icfai University, Tripura, have been recognized by the University Grants Commission, India as self-financed, private universities.