



U.S. Citizenship
and Immigration
Services

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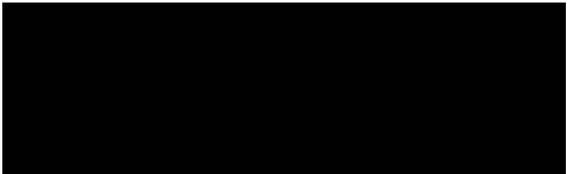


FILE: EAC 08 139 53221 Office: VERMONT SERVICE CENTER Date: DEC 04 2009

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 Louisiana fast food company with 24 employees.¹ 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 concluding that the petitioner failed to establish that the proffered position is a specialty occupation.

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

The primary issue that the AAO will consider 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 also 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;

¹ It should be noted that, according to Louisiana state corporate records, the petitioner's charter in Louisiana was revoked on February 19, 2009. Therefore, since the corporation is prohibited from engaging in commercial business without reinstatement, and the petitioner has not taken steps under Louisiana law to seek reinstatement, the company can no longer be considered a legal entity in the United States. See La. RS 12:163. Therefore, as this clearly and unequivocally renders the petitioner ineligible for the classification sought, the petition would have to be denied on this basis if the appeal were not being denied for the reasons stated in this decision.

- (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), U.S. Citizenship and Immigration Services (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.

In this matter, the petitioner seeks the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s March 28, 2008 letter of support; and a letter from counsel for the petitioner in response to the RFE dated June 1, 2008. The support letter indicates the proffered position would require the beneficiary to perform the following duties:

- Researching market conditions in local, regional, or national area to determine potential sales of product; Analyzing past buying trends, sales records, and pricing to determine values and yield;
- Collecting and analyzing data on customer preferences and buying habits;
- Preparing cost estimate reports to determine accurate and competitive pricing of products and services;
- Producing and analyzing monthly budgets and activity reports;
- Reviewing market trends and competition in the fast food industry; and
- Preparing reports and graphic illustrations of findings.

In the support letter, the petitioner writes the following:

Established in 2005, [petitioner] is a Louisiana based fast food company doing business under trade name "[REDACTED]" [sic] [Petitioner] employs twenty-four individuals. [Petitioner's] corporate objective is to become one of the leading fast food companies in United States. To accomplish the goal of becoming a major participant in the **insurance business**, it is imperative that [petitioner] hire qualified employees in the specialty occupation of a Market Research Analyst.

(Emphasis added.). The AAO presumes that the petitioner meant to say "fast food business" instead of "insurance business," however, this mistake on the part of the petitioner is evidence that the petitioner likely wrote this letter using stock language prepared by someone other than the petitioner.

On appeal, for the first time, in describing the nature of the petitioner's business, counsel for the petitioner states that the petitioner has four fast food restaurants as evidence of its expansion. This claim was not asserted either in the petition or in response to the RFE and no independent evidence to this effect has been provided to support this assertion. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. The AAO will not consider evidence submitted for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

On April 24, 2008, the director issued an RFE requesting a detailed statement articulating the beneficiary's proposed duties and day-to-day responsibilities as well as evidence exhibiting the need for a marketing research analyst at the petitioner's company.

Counsel for the petitioner submitted a response to the RFE with a letter from counsel dated June 1, 2008. Other than the letter written by counsel, no additional documentation from or about the petitioner was included. Instead, counsel provided advertisements from other companies seeking market research analysts and an expert opinion letter from [REDACTED] of Management Science at the Robert H. Smith School of Business, University of Maryland. The letter from counsel in response to the RFE states the following:

Prior to *our* efforts to hire [the beneficiary], the Finance Manager of the company was performing the Market Research Analyst job duties a degreed professional. She is a degreed individual with several years of experience in the marketing and sales management field. Based on 3 to 1 ratio utilized by USCIS, She has education, training, and experience equivalent to U.S. Bachelor's degree in Business. (**Exhibit 1**). Due to complexity of the voluminous transactions taking place, [petitioner] strongly believes that having an in-house full-time Market Research Analyst will be efficient, cost-effective and highly beneficial for the company. [Beneficiary's] responsibilities primarily include formulating policies for potential sales of service. [Beneficiary] will spent [sic] majority of time on gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution. He will analyze data on past sales to predict future sales. [Beneficiary] will devise methods and procedures for obtaining the sales

data, directing staffing, coordinating sales promotions and distribution, advising dealers and clients, analyzing sales data and recommending solutions for improvements. These responsibilities require comprehensive knowledge of the product, sales statistics, demographic measurement and analysis, and promotional campaign activities. To develop and maintain successful market research plan and campaign, an individual must have the sophisticated level of knowledge of business functions and marketing concepts that is gained through completion of a bachelor's degree in Business Administration, or a closely related field, or equivalent work experience.

(Emphasis added). The reference by counsel to himself, though clearly unintended, is an additional indication that the petitioner is incapable of providing a business justification for a market research analyst, especially given that no documentation is provided by the petitioner to support these assertions. The non-existence or unavailability of evidence material to an eligibility determination creates a presumption of ineligibility. See 8 C.F.R. § 103.2(b)(2)(i). There was no letter from the petitioner or independent evidence, such as reports and data generated by the Finance Manager who allegedly previously performed these duties, included to demonstrate that the petitioner's operations are such that it requires the services of a full-time market research analyst, even though the RFE specifically requested evidence exhibiting the need for a marketing research analyst at the petitioner's company.² 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). Moreover, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The director denied the petition on June 19, 2008, on the basis that the proffered position does not qualify as a specialty occupation. On appeal, counsel disputes this finding.

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 in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. 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 in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

² It is also noted that the petitioner has not submitted evidence, such as a copy of the franchise agreement, indicating that the franchisor will not provide marketing services, further casting doubt on the petitioner's claim to be a franchise that requires its own market research analyst.

In the H-1B supporting documents submitted with the petition as well as in the brief on appeal, the petitioner argues that the proffered position most closely resembles the position of market research analyst in the *Handbook*. However, the utter lack of supporting evidence regarding the petitioner's business (indeed, there is no evidence of the petitioner's business other than the initial support letter from the petitioner and assertions by counsel), even when it was specifically requested in the RFE, calls into question the truthfulness or accuracy of the proffered position description provided by the petitioner and counsel.

Regardless, the *Handbook* does not indicate that entry into positions in the occupation of market research analyst normally requires at least a bachelor's degree, or the equivalent, in a specific specialty. While the 2008-2009 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 the range of qualifying degrees indicated in the Significant Points that introduces the 2008-2009 *Handbook's* chapter "Market and Survey Researchers," which are:

- Market and survey researchers need at least a bachelor's degree.
- Continuing education and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data is important for advancement.
- 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 2008-2009 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," which does not specify a particular major or academic concentration:

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.

Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a degree in a specific specialty and as the limited extent to which the evidence of record develops the proffered position and its duties does not distinguish the proffered position from the general level of market

research analysts requiring no more than a bachelor's degree without particular specialization, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered 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)(I).

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, that 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. In response to the RFE, the petitioner submitted an expert opinion letter from [REDACTED] Professor of Management Science at the Robert H. Smith School of Business, University of Maryland. In his opinion letter, [REDACTED] states:

As [the petitioner] is a growing fast food company that seeks to expand further, it is vital for the company to employ a Market Research Analyst. Similarly, many growing fast food companies with 20 or more employees regularly hire a Market Research Analyst or someone in a similar professional position, and require the same or similar duties as those required by the Market Research Analyst position for [the petitioner], to research market conditions, collect market data, review market trends, and perform similar duties which have a significant impact on current sales as well as future expansion.

Although the writer describes the petitioner as a growing fast food company with 20 or more employees, he provides no evidence in support of this assertion. The writer does not specify what documents he reviewed before writing his opinion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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 record does not demonstrate that the writer has adequate knowledge of the facts presented. Without any reference to objective evidence in his letter, the writer must be presumed to have based his opinion on a generic description of job duties and business operations as provided to him by the petitioner. The writer does not demonstrate knowledge of the petitioner's particular business operations or relate any personal observations of those operations or of the work that the beneficiary would perform. His opinion does not

relate his conclusion to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for his conclusion about the educational requirements for the particular position at issue. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). As the opinion of the writer is not based on an adequate factual foundation, the AAO does not find it probative.

Additionally, the record's job-vacancy advertisements are not evidence of a common degree-in-a-specific-specialty requirement in positions that are both: (1) parallel to the proffered position; and (2) located in organizations similar to the petitioner. In response to the RFE, the petitioner submitted 17 job advertisements, none of which are for fast food franchises, or are even in the restaurant industry. Moreover, many of these do not require a degree in a particular specialty.

On appeal, the petitioner submitted four additional advertisements. Two of the advertisements are not for market research analysts for a small franchise operation. Instead, they are for a consumer research analyst and a senior compensation analyst for headquarters of large franchise corporations, rather than for a small operation like the petitioner's, and, moreover, do not specify that the degree be in a particular specialty. The third advertisement requires a masters degree, but not in a particular specialty. The fourth advertisement is for a company that is not a fast food franchise corporation and therefore is not similar to the petitioner. Moreover, the advertisements' content and the record's information about this petition's proffered position and the petitioner's business operations are too limited and generalized to establish that the advertised positions are parallel to the proffered position and that the advertising organizations are similar to the petitioner. Furthermore, the range of the degree requirements cited in the job advertisements are not inconsistent with the *Handbook's* information to the effect that a bachelor's degree in a specific specialty is not normally a requirement for market research analyst positions.

The petitioner has not satisfied 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 coursework acceptable for market research analyst positions, including degrees not in a specific specialty related to market research analysis. Moreover, as mentioned previously, 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.

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. In the brief submitted on appeal, counsel for the petitioner claims that the petitioner's position of market research analyst has "always been filled by an [sic] individuals with education and experience equivalent to a U.S. Bachelor's degree in Business Administration, or a related degree which requirements have remained consistent in our staffing of [the beneficiary]. Prior to hiring of [the beneficiary], **other business managers of the company are performing the duties of Market Research Analyst**. They are degreed professional [sic] with emphasis in business." [Emphasis added.] In other words, the proffered position is a new position and, as such, the petitioner has not established this

criterion. Counsel does not provide any names of these individuals who allegedly performed the duties of the proffered position nor copies of their degrees. As mentioned earlier, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506. 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 mentioned earlier, 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.

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.

Beyond the decision of the director, the AAO also finds that the petitioner failed to submit requested evidence that precludes a material line of inquiry. The petitioner and counsel did not provide any supporting evidence exhibiting the need for a market research analyst when it was specifically requested by the director to provide further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition was filed. As stated earlier, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Therefore, the petition will be denied for this additional reason.

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 appeal will be dismissed and the petition denied 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.