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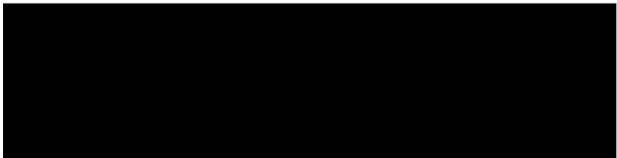
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



**U.S. Citizenship
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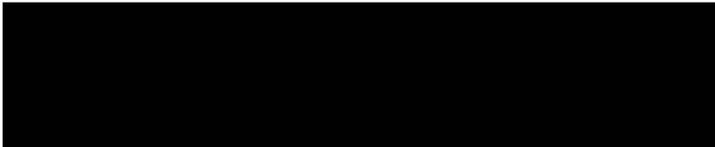


FILE: WAC 08 145 53078 OFFICE: VERMONT SERVICE CENTER DATE: **JAN 06 2010**

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 avers that it sells and markets soccer apparel and gear, was established in 1987, and has 13 employees. It seeks permission to employ the beneficiary as a market research analyst and, 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, finding that the proposed position was not a specialty occupation. On appeal, counsel submits a brief and the petitioner submits additional evidence.

When filing the H-1B petition, the petitioner stated that the beneficiary would research and analyze market segments. The list of duties that the petitioner has submitted, and which the AAO shall assess to determine whether the position is a specialty occupation, are:

- Research pertinent elements of our current marketing and sales operations and areas for future expansion and diversification and make ongoing recommendations to executive management;
- Communicate and interface with our current outside marketing consultants and in-house marketing managers to become familiar with the procedures and methods they have been using for obtaining accurate information, and update current, and devise additional, statistical research means for our market sectors and sub-sectors;
- Review and analyze [petitioner]-specific and industry marketing reports and [the petitioner's] market penetration and future prospects in the various marketing areas;
- Analyze profit margins and competition in the marketing areas and make recommendations for each of the specific sub-sectors as to whether we should attempt to intensify our marketing activity;
- Formally or informally poll, or oversee the polling of, a sampling of our customers as to how well we are meeting their current needs as well as the purchasing and diversification plans they have for the short- and intermediate- terms;
- Oversee the analysis of the national and regional soccer publications and pass on to our marketing managers sales leads;
- Investigate market expansion and diversification into other sport and non-sport-related areas ...;
- Consideration of initiating the marketing of our products in other countries in the Western Hemisphere...; and
- Make recommendations to us as to one or more of these markets to expand into.

The petitioner stated that it had previously hired an individual with a bachelor's degree in economics for the proffered position pursuant to an approved H-1B petition that it had filed on that former employee's behalf. On appeal, counsel states that the duties of the former employee are no different from the duties that the petitioner is expecting the beneficiary to execute.

On October 2, 2008 the director denied the petition. The director analyzed the job duties and responsibilities that the petitioner had provided and determined that they were not associated with a market research analyst job. First, the director stated that the petitioner's business "extends beyond the scope of the local community" and, therefore, "the business lacks a consumer base that is extensive or complex enough to require the services of a marketing and/or sales staff." The director further stated that the petitioner's lack of organizational complexity also could not support a finding that the beneficiary would be working as a market research analyst.

On appeal, counsel disagrees with the director's findings and presents several arguments in rebuttal. Counsel states that the petitioner's operations extend well beyond the local community with sales in all of the 50 states as well as other countries. Counsel cites to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* to support his argument that the position being offered here is a market research analyst position and not a marketing manager position. Counsel further discusses the petitioner's employment of another individual in H-1B nonimmigrant status from July to August 2005 to perform the same duties that the beneficiary would execute and the petitioner's decision to "reactivate" the position in 2008. As part of the appeal, the petitioner submits the first two pages of its "customer master list," email messages regarding the petitioner's national and international sales, and a copy of its past market research analyst's diploma along with an educational evaluation of that degree.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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;
- (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 a 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. 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, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

Upon review of the job description and comparing it to the occupations of a market research analyst and a marketing manager, the AAO finds that the proffered position would be an amalgam of these two professions, but with more of the duties being related to a marketing manager. For example, the duty of "investigate market expansion and diversification into other sport- and non-sport-related areas" is related to market analysis. However, the duties of "communicate and interface with our current outside marketing consultants and in-house marketing managers," "review and analyze [petitioner]-specific and industry marketing reports and [the petitioner's] market areas," and "oversee the analysis of the national and regional soccer publications and pass on to our marketing managers sales leads" are duties associated with a marketing manager.

The AAO routinely consults the *Handbook*¹ for its information about the duties and educational requirements of particular occupations. The *Handbook's* information on educational requirements for the position of market research analyst indicates that a bachelor's degree "is the minimum educational requirement for many market and survey research jobs." The AAO notes the significance of the DOL's declination to state that the bachelor's degree must be in a particular field of study. For a marketing manager position, the *Handbook* notes: "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." Here, there is no specification of a bachelor's degree in a specific field of study for employment as a marketing manager, and a bachelor's degree is listed only as a preference among certain employers, and not as a requirement. As stated previously, 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. Here, the occupations of market research analyst and marketing manager do not qualify as specialty occupations under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), because the incumbent could hold a bachelor's degree in any number of fields as a market research analyst or not hold one at all as a marketing manager. Therefore, a baccalaureate or higher degree or its equivalent in a particular specialty is not normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position;

¹ *Occupational Outlook Handbook*, 2008-2009 ed., available at <http://www.bls.gov/oco/ocos086.htm> (accessed December 16, 2009).

or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. 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 noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree in a specific field of study as a minimum qualification. The petitioner also has not submitted any evidence that the industry's professional associations have made a degree a minimum requirement for entry into a market research analyst position or that businesses similar to the petitioner require a degree in a specific specialty for their positions that are parallel to the one offered here. Therefore, the petitioner has failed to establish that a degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve routine market analysis and marketing tasks that would not require any particular specialization. The petitioner, therefore, has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires the petitioner to demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, including the names and dates of employment of those employees with degrees who previously held the position, and copies of those employees' diplomas. Here, the petitioner states that since its inception in 1987, it has employed one individual in the proffered position. According to counsel, the petitioner's former employee was employed in H-1B nonimmigrant status from July until August 2005 and performed the same duties as those listed for the proffered position. The petitioner submits a copy of the former employee's diploma and an educational evaluation to show that this employee possessed the foreign equivalent of a bachelor's degree in economics from an accredited university in the United States.

The AAO notes that the phrase "normally requires" refers to a petitioner's hiring pattern over an extended period time. Considering that the petitioner has been in business for over 20 years but has employed only one individual from July until August 2005 in the proffered position, it cannot be concluded that the petitioner normally requires a bachelor's degree or its equivalent. Additionally, the AAO observes that the bachelor's degree of its former employee and the bachelor's degree of the beneficiary are not in the same or related specialty. While the petitioner's former employee holds a bachelor's degree in economics, a copy of the beneficiary's transcript from Oklahoma City University indicates that he received a bachelor's degree in "Mass Comm/Advertising." This evidence shows that, while the petitioner may prefer to hire an individual with a bachelor's degree, the degree need not be in a specific specialty. As stated earlier in this decision, 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.

Regarding counsel's implication on appeal that USCIS should approve this petition because it approved one that the petitioner submitted in the past for the same position, the AAO notes that it is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If, however, the previous nonimmigrant petition was approved based on the same evidence that is contained in the current record, the approval would have constituted material and gross error on the part of the director. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed 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 in the specialty. The record contains no evidence that the beneficiary would perform duties that are either specialized or complex that would make the requirement of a specialized degree a necessary qualification. Counsel on appeal states that: "Doing the research and analysis for, and providing marketing analysis to . . . management, regional managers and marketing managers on pertinent aspects of [the petitioner's] current and potential product lines is indeed complex." Counsel, however, fails to discuss how such duties involve complicated or unique skills that only someone with a bachelor's degree in a specific specialty could execute them successfully. As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden.

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