

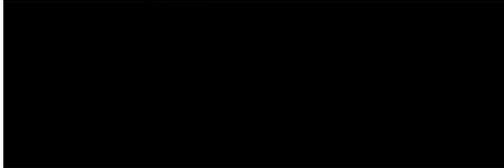
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**U.S. Citizenship
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Services**



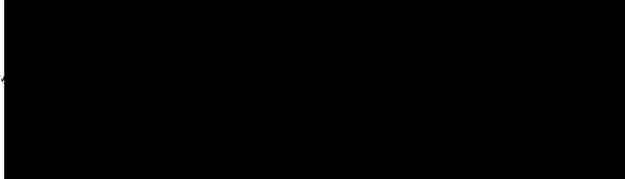
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FILE: WAC 03 110 55012 Office: CALIFORNIA SERVICE CENTER Date: JAN 05 2005

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 materials 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 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 a designer and manufacturer of hardware products.¹ It seeks to employ the beneficiary as a market research analyst 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 grounds that (1) the applicant did not have the minimum education, specialized training, or employment experience to qualify to perform the services of the subject specialty occupation and (2) the proffered position did not qualify as a specialty occupation. On appeal counsel argues that the beneficiary is qualified to perform the duties of the proffered position and that the subject position qualifies as 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.

¹ When the instant H-1B petition was filed in February 2003 the petitioner was called Penn Fabrication (USA), Inc. Later in 2003 the company merged with Elcom Hardware, Inc. and a new company was formed called Penn Elcom, Inc.

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.

As provided in 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the RFE; (4) the director’s decision; (5) the petitioner’s appeal, Form I-290B; and (6) the petitioner’s appeal brief with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

Though the service center director initially analyzed whether the beneficiary was qualified to perform the services of a specialty occupation – in particular whether he met the criterion set forth in 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) – the AAO will first address the issue of whether the proffered position qualifies as a specialty occupation. Without such a positive finding on this issue the question of the beneficiary’s qualification to perform the services of the subject specialty occupation becomes irrelevant.

The director determined that the duties of the proffered position, as described by the petitioner, did not reflect the duties of a market research analyst, but rather those of “Advertising, Marketing, Promotions, Public Relations, and Sales Managers,” as described in the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, positions which do not normally require a baccalaureate level of study as a minimum requirement for entry into the position. As noted in the *Handbook*, holders of these positions are responsible for “coordinat[ing] the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities” of the organization. The director quoted an entry from the *Handbook* indicating that a baccalaureate degree, while preferred, is not a normal industry-wide minimum requirement for entry into the occupation. Nor did the record indicate that the petitioner normally required applicants for the subject position to have baccalaureate degrees. Finally, the director found that the duties and responsibilities of the proffered position did not indicate a level of complexity or authority beyond what is normally encountered in the field. Based on the foregoing factors, the director

concluded that the subject position could be performed by an experienced individual with less than a baccalaureate degree. Hence, it was not a specialty occupation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered by CIS 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. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). 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, id.*, at 1165-66.

Counsel's first objection on appeal is to the director's description of the petitioner as "a manufacturer and distributor of music, audiovisual, container & display products, with nine employees." Counsel states that the petitioner is a designer and manufacturer of hardware products – such as handles, hinges, latches, etc. – and has 50 employees, as evidenced in the petitioner's response to the RFE and various documents in the record. It appears that counsel is correct with respect to the petitioner's line of business and number of employees. What counsel neglects to mention, however, is that the director's description of the petitioner's type of business and number of employees is lifted directly from the Form I-129 petition, co-signed by the petitioner and counsel, in which the petitioner described its business as "manufacturing and distribution of music, audiovisual, container & display products" and declared that it currently had nine employees. Neither counsel nor the petitioner has provided any explanation for this rather major informational discrepancy.

Counsel asserts on appeal that, contrary to the director's finding, the duties of the proffered position do match those of a market research analyst, which is a specialty occupation because it requires at least a baccalaureate degree for entry level positions. Moreover, even if the position were deemed to be that of a "marketing/advertising manager," the position qualifies as a specialty occupation because it meets three different criteria of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). In particular, counsel asserts that (1) a baccalaureate degree is normally required for entry into the occupation, (2) the degree requirement is common to the industry, and (3) the duties are so complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As described by the petitioner in a letter responding to the RFE, the duties of the proffered position consist of the following:

Analyzing sales and financial data; implementing promotional strategies and managing marketing campaigns; analyzing market conditions in local and regional areas to increase potential sales; creating questionnaires and opinion polls, analyzing data, creating graphs and projecting future market conditions; organizing the findings and preparing recommendations to implement changes; creating new marketing strategies and establishing prototypes for new catalogues and brochures coinciding with the overall marketing strategies and business plan created by the beneficiary and approved by the president and CEO; devising methods to increase profitability, manage expenses, and

reduce department overhead; reviewing data on competitors, analyzing their marketing and distribution methods; reviewing proposals submitted by various departments; assisting in any future reorganization of the business, as well as new sales and marketing strategies due to changes in market conditions and technologies; preparing regular reports for management and conferring with management weekly.

Counsel asserts that the foregoing duties accord closely with the *Handbook's* description of a market research analyst and quotes the following passage from page 239 of the 2002-23 edition:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon their findings.

Consistent with this description counsel points to the petitioner's declaration that the beneficiary will spend 50% of his time conducting market studies, 30% of his time preparing reports for management, and 20% of his time conferring with management.

Counsel overlooks additional information in the *Handbook*, however, which indicates that the types of companies typically employing market research analysts are different from the petitioner. As stated in the 2004-05 edition of the *Handbook*, at page 173: "The industries which employ the largest number of market research analysts are management, scientific, and technical consulting firms, insurance carriers, computer systems design and related firms, software publishers, securities and commodities brokers, and advertising and related firms." The petitioner, by contrast, is a modest-sized company manufacturing small-scale hardware items. Moreover, the AAO agrees with the director that the duties of the position accord with the *Handbook's* description of a "marketing manager." As stated in the *Handbook*, 2004-05 edition, at page 23:

Marketing managers develop the firm's detailed marketing strategy. . . . [T]hey determine 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 with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. . . . [T]hey monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising managers to promote the firm's products and services and to attract potential users.

In addition to the close accordance of these duties with those of the proffered position, the *Handbook* states that manufacturing firms (like the petitioner) are a primary employer of marketing managers. Based on the entire record, the AAO concludes that the proffered position is that of a marketing manager, not a market research analyst.

Counsel argues that, even as a marketing manager, the subject position qualifies as a specialty occupation. Counsel quotes from the *Handbook*, 2002-03 edition, at page 28:

For marketing, sales, and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. In highly technical industries, such as computer electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

For advertising management positions, some employers prefer a bachelor's degree in advertising or journalism. A course of study should include marketing, consumer behavior, market research, sales, communication methods and technology, and visual arts – for example, art history and photography.

According to counsel, the foregoing language indicates that marketing and advertising manager positions require a bachelor's degree and employers prefer a degree in certain related fields.

Nothing in that language, however, indicates that a bachelor's degree in a specific specialty is the minimum requirement for entry into a marketing manager position. The *Handbook*, 2004-05 edition, at page 24, clearly states that “[a] wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable.” Thus, the petitioner has not established that a baccalaureate or higher degree in a specific specialty is the minimum requirement for entry into its marketing manager position, as required to meet the first alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Counsel argues that the proffered position qualifies as a specialty occupation under the second alternative criterion, set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), because a baccalaureate requirement is common in the industry for a marketing and/or advertising manager. In support of this assertion counsel submitted five internet advertisements for marketing or advertising managers, all of which required a bachelor's degree. Four of the five, however, did not require that the bachelor's degree be in any specific specialty. Indeed, only one – from Microsoft – even suggested that a degree in marketing, communications, or film (the beneficiary's degree area) was preferable. Microsoft also expressed the preference for “no less than 15 years” of advertising experience, however, which dwarfs the beneficiary's experience in marketing since his graduation in 1999. Moreover, Microsoft is a giant company in a completely different line of business from the petitioner. Accordingly, its advertising manager position is not a parallel position in a similar industry organization, as prescribed in the regulation. This same infirmity applies to the other four internet positions: Hospitality Marketing Concepts, a services provider in the tourism and hospitality industry, seeking an E-commerce marketing manager; [REDACTED] a provider of product lifecycle management software, seeking a marketing manager; [REDACTED] Business Journal, a local newspaper, seeking an advertising account manager; and [REDACTED] Chocolate Company, seeking a marketing manager for its restaurant and retail division. None of these companies, as far as the evidence shows, is comparable to the petitioner in its scale of operations or type of business activities. Thus, the record does not establish that “the degree requirement [in a specific specialty] is common to the industry in parallel positions among similar organizations,” as required for the petitioner's marketing manager position to meet the second alternative criterion of a specialty occupation set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Counsel acknowledges that the proffered position does not qualify as a specialty occupation under the alternative criterion set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – “[t]he employer normally requires a degree or its equivalent for the position”– because it is a newly created position and the petitioner has no hiring history.

Counsel argues that the proffered position qualifies as a specialty occupation under the alternative criterion set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because the nature of the duties demand in-depth theoretical knowledge of economics, marketing, and business management principles and practices that is usually associated with a bachelor’s degree. The position requires an ability to create, conduct, and analyze market research studies, counsel contends, and to make recommendations to the heads of the company based on the findings. The description of the job duties and the other evidence of record, however, does not establish that the duties of the proffered position are so specialized and complex that the knowledge needed to perform them requires a degree in a specific specialty.

For the reasons discussed above, the petitioner has failed to establish that the position proffered by the petitioner meets any of the criteria of a “specialty occupation” outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b), and 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner has not established that the beneficiary will be performing services in a specialty occupation.

As previously discussed, the director also determined that the beneficiary was not qualified to perform the services of a specialty occupation. Since the beneficiary’s credentials are relevant only if the proffered position is found to be a specialty occupation, which is not the case here, the AAO need not further address counsel’s arguments with respect to the beneficiary’s qualifications.

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.