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FILE: EAC 03 046 53067 Office: VERMONT SERVICE CENTER Date: SEP 09 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 documents 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 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 import, export and financing company that seeks to employ the beneficiary as a market research analyst. The petitioner 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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) 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.

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 critical element is not the title of the position nor 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a market research analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's November 26, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to the letter of support, the beneficiary would perform duties that entail: establishing research methodologies and design format for gathering data; examining and analyzing statistical data to forecast future market trends; gathering data on competitors and analyzing their pricing policies, sales targets and achievements, and methods of marketing and distribution in comparison to the petitioner's; and evaluating the data gathered, formulating reports and making recommendations to management based on the findings. In response to the director's request for evidence, the petitioner described the beneficiary's duties as including: identifying products that can be sold by analyzing various trade publications, such as catalogues and trade magazines pertaining to various lines of products, such as kitchen accessories, personal care and lifestyle products; obtaining, studying and analyzing promotional materials distributed by various manufacturers through promotional videos, media and other channels, for viability of any of the products; attending sales conventions, trade shows, seminars and product presentations; gathering data on industry competitors, such as competitors' pricing policies, sales targets, methods of marketing and distribution and evaluating the same to determine the viability of new products to the petitioner's existing product line, specifically in terms of current customer preferences and pricing of goods; analyzing infomercials to determine what products are currently being sold by competitors and to determine the strengths and weaknesses of the products to ensure that the petitioner provides a better product; coordinating and planning product development from design concept to actual delivery in the market, based on research findings and analysis; designing product packaging, product brochures and point of sale material for retail packaging; planning marketing strategy of products based on calculating the product's average product life cycle; modeling and forecasting to ensure a good working capital management utilizing various statistical tools and other tools of analyst; developing and presenting strategic financial and marketing plans utilizing information technology tools such as spreadsheets to improve the efficiency of the analysis; conducting sales projections and inventory analysis and coordinating with the sales department in the area of purchase planning; and processing proposals for clients including sample orders, as well as collection and analysis of feedback from customers. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in marketing, commerce or business administration.

The director found that the proffered position was not a specialty occupation, because the duties were most like those of a sales professional, which the director found did not require a bachelor's degree. In addition, the director found that the petitioner is not the type of company that typically employs market research analysts. The director found further 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 that the director misrepresented the size of the petitioner's business, stating that its gross revenue was \$1,500,000, when it is actually a \$35,000,000 business. Counsel states that this error led the director to disregard both the reasonable needs of the petitioner's business and the job advertisements the petitioner submitted to establish the industry standard among its competitors. Counsel also asserts that the director disregarded the expert opinion submitted. Finally, counsel states that the position includes no sales duties, and is primarily a position involving marketing analysis.

The AAO concurs with counsel that the position is not like a sales manager.

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 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; 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)).

In his denial, the director, relying on the *Handbook*, concluded both that the duties of the proffered position were not those of a marketing research analyst and that the record failed to establish that the petitioner's business was of a type to require a market research analyst. While the AAO concurs in the director's finding that the proffered position is not that of a market research analyst, as discussed below, it finds the director to have too narrowly defined the sectors of the economy that might require the services of a marketing research analyst. In that the 2004-2005 edition of the *Handbook* indicates that the work of marketing research analysts is concerned with the potential sales of a product or service and that they provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services, market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner is an import/export company does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of increasing its business opportunities and earnings. However, the petitioner's potential need to conduct market research does not establish the proffered position as a specialty occupation.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of market or marketing research analysts, as described at pages 173-174 of the *Handbook*. It has taken particular note of the following part of that discussion:

[M]arket research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The AAO finds that it is market research analysts' work in the design, development and supervision of original market research that sets this occupation apart from what might otherwise be characterized as a marketing manager position, employment that also requires the incumbent to conduct market research. Although the petitioner indicated that the beneficiary would devise methodology for research and analyze the data, it offered no discussion of whether such research would be original in nature, nor the role of the beneficiary in carrying out such research. In the absence of such information, the analysis and research responsibilities described by the petitioner appear more closely related to the work of marketing managers, whose work is also focused on the marketing and selling of products and services. As discussed within the occupation of advertising, marketing, promotions, public relations and sales managers at pages 23-24 of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

...

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets 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. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background

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. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

. . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel states that the *Handbook* indicates that a market research analyst is a specialty occupation. The AAO agrees with counsel that a market research analyst is generally a specialty occupation, but in this instance, the proffered position is a marketing manager, despite the title the petitioner gives it. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Regarding parallel positions in the petitioner's industry, the petitioner submitted numerous newspaper and Internet job postings for market research analysts. As noted, the AAO finds that the proffered position is a marketing manager, rather than a market research analyst. In addition, there is no evidence to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Thus, the advertisements have little relevance.

The petitioner also submitted a copy of an approval notice for an H-1B visa for a market research analyst at one of the petitioner's competitors. The record of proceeding does not contain copies of the visa petition that the petitioner claims was previously approved. It must be emphasized that that each petition filing is a

separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The record does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Counsel asserts that the director disregarded the expert opinion letter the petitioner submitted to establish that the proffered position is a specialty occupation. The professor who wrote the letter has a Ph.D. in biology and is a professor of health and nutrition sciences. She does not purport to be, nor is there any evidence in the record that she is an expert in the field of marketing or market research. CIS may, in its discretion, accept letters and advisory opinion statements as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm., 1988). In that the information in the letter conflicts with the information in the *Handbook*, and there is no indication that the author is an expert in the field of proposed employment, the AAO will discount this evidence.

The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (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. There is no evidence in the record regarding the petitioner's past hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(4)(A)(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.

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, or its equivalent, 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).

The AAO notes that the petitioner states that its gross income is \$35 million, rather than the \$1.5 million the director ascribed to it. The size of the business does not change the complexity or level of the duties in this instance. The beneficiary would not be performing original market research of a type that would rise to the level of a specialty occupation. In addition, the record contains no evidence to support the petitioner's report of its gross income. 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)).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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