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U.S. Citizenship  
and Immigration  
Services

*DL*



FILE: SRC 04 006 53178

Office: TEXAS SERVICE CENTER

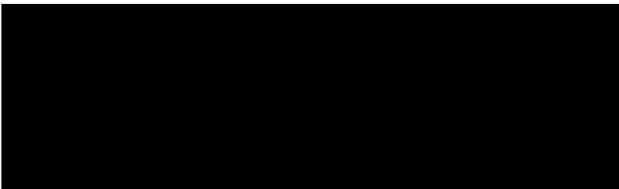
Date: **JAN 26 2005**

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a foreign exchange services company that seeks to employ the beneficiary as a marketing 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 and other documentation.

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 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) 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 marketing analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail the following:

- Promoting new business for the petitioner;
- Developing marketing and financial goals for the petitioner;
- Quoting exchange rates based on current market trends and conditions; and,
- Conducting research on competitors and determining client satisfaction.

The petitioner indicated that a qualified candidate for the job would possess a bachelor of business administration degree in marketing plus job experience in the marketing of foreign exchange businesses.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish that the position met any of the four criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the duties of the proffered position pertain to the typical market research analyst job as described in the *Handbook*. He contends the director failed to give sufficient weight to statements from both a marketing expert and from a bank in support of the petitioner's assertion that the position qualifies as a specialty occupation.

Upon review of the record, the AAO has determined that the petitioner has established that the proffered position fails to qualify under any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), and that it therefore fails to qualify as a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is primarily that of a market research analyst. A review of both the marketing research analyst and the marketing manager job descriptions in the *Handbook* confirms that the job duties parallel some of the responsibilities of both a marketing manager and marketing research analyst; however, the AAO finds that the marketing manager title, rather than the marketing analyst, fits with the bulk of the duties the petitioner envisions the beneficiary performing in the proffered position.

The *Handbook* describes the duties of the marketing research analyst as:

- Focusing in general upon the potential sales of a product or service;
- Gathering data on competitors and market prices;
- Devising methods for data gathering;
- Making recommendations to their client or employer based upon their own research analysis of market data;
- Designing and conducting surveys for use in “making fiscal or policy decisions, measuring policy effectiveness and improving customer satisfaction.”
- Consulting with economists, statisticians, other analysts and other data users to design surveys.

By comparison, the *Handbook* describes the duties of a marketing manager as:

- Developing in general a detailed marketing strategy;
- Determining the demand for products and services of the client or employer and for those of its competitors;
- Identifying potential markets or clients;
- Developing pricing strategy for high profit while maintaining customer satisfaction;
- Monitoring trends in consumer demand for new products and services;
- Acting as liaison between smaller firms and an advertising agency.

In the sworn statement of [REDACTED] a marketing expert, she states:

The business purpose of [the petitioner] is to provide foreign exchange services, including professional financial consultancy in every aspect of the current exchange market. It is reasonable to conclude that a business such as this would require the services of a marketing analyst due to the complexity of the involved transnational business/marketing practices as well as leveraging into new markets in accordance with company fiscal and marketing goals and strategies[.]”

A similar support letter from a U.S. bank states that the petitioner has invested \$150,000 in two certificates of deposit. The evidence shows that the petitioner is actively engaged in the foreign exchange business.

The petitioner states that it started in business in 2003, the same year it filed the Form I-129 herein, and that it has two employees, both with bachelor’s degrees in marketing or finances from U.S. colleges or universities. The petitioner thus has no track record as to what it required of previous employees who may have preceded the beneficiary in the proffered position. In its letter of December 18, 2003, the petitioner states:

Although we are a new company, one of our strategic business goals is to develop an integral marketing campaign to promote our financial services to corporate entities and penetrate into new key markets in this highly competitive service oriented industry. To accomplish this, the professional services of a market analyst are required as a business necessity in order to expand and serve our client base.

Post Oak Foreign Exchange, LLC provides foreign exchange services, including professional financial consultancy in every aspect of the currency exchange market to assist clients to make the best financial decisions and the best exchange rates. We utilize high technological equipment and advanced systems of communication to provide the best currency exchange rates worldwide and to enhance financial decisions. We primarily service multinational maquiladoras (twin plants) based in Northern Mexico, including Panasonic, Samsung, Motorola, Nextel and John Deere. In providing the best monetary quotes to our client base, Post Oak Foreign Exchange, LLC, has a strategic alliance with Base International, Casa de Cambio, a well-known Mexican firm. One of the top three, which specialize in foreign exchange markets, including the buying and selling of negotiable instruments as well as the world's most important currencies such as the U.S. Dollar, Euro, British pound and Japanese Yen, to mention a few [sic]. ...

The director determined that the proffered position was not a specialty occupation, based on insufficiency of the evidence in general and, in particular, upon a lack of showing that a bachelor's or higher degree is the normal minimum for entry into the marketing analyst position "as it relates to [the petitioner's] organization and the industry." Additionally, the director did not find the proffered position "so complex or unique that it can be performed only by an individual with a baccalaureate, or higher, degree."

On appeal, counsel states that the proffered position is a specialty occupation, based upon the *Handbook's* analysis of marketing research analysts, which counsel contends the director failed to apply in its decision. Citing *Unical Aviation Inc. v. INS*, 248 F. Supp 2d 231[sic] (C.D. Cal. 2002),<sup>1</sup> counsel contends that evidence contained in the *Handbook* is "not only relevant but dispositive" of whether the duties of the proffered position qualify as a specialty occupation. Counsel states the judge in *Unical* went even further, finding CIS had abused its discretion in concluding that the analyst position offered in *Unical* and the job duties in the *Handbook's* treatment of marketing research analyst "not to be comparable." Counsel by contrast contends the job duties in the generic *Handbook* description for market research analyst, and those for the proffered position, most closely match each other because both involve gathering and evaluating of data "in order to generate more business and develop new products." In particular, counsel contends, the proffered position involves "identifying new market sources and obtaining clients," similar to the *Handbook's* detailing of a typical market analyst's responsibilities.

Counsel further cites the sworn statement of marketing expert Betsy Gelb, Ph.D., who concluded the position is "complex and specialized in nature" and one requiring the application and understanding of principles and theories that only one with a bachelor's degree in marketing could properly attain. He further cites *Tapis International v. INS*, 94 F. Supp. 2<sup>nd</sup> 172 (D. Mass. 2000), for the proposition that a bachelor's of business administration could suffice for classifying a particular position as a specialty occupation if "the employer can show he requires a certain type of bachelor's degree (business or marketing) in addition to specialized experience or training (design)."

As previously mentioned, 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. In the December 28, 2003 letter, the petitioner stated that its job requirement for the

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<sup>1</sup> Actual cite, 248 F. Supp.2d 931.

position “minimally requires a Bachelor of Business Administration degree in marketing plus six (6) months of professional experience in the marketing of foreign exchange services/trade.” The letter continued: “An individual without college specialization in business administration would be unable to explore the market and find potential business opportunities. An individual without business administration education and sales experience cannot perform these duties.”

However, referring to the job duties of the proffered position listed above, it is clear that to perform the bulk of her duties, the beneficiary would spend much of her time in sales and sales-related activities rather than with the more solitary aspects of doing research and data analysis. By contrast, when the *Handbook* describes the role of market research analysts, it speaks of devising methods for gathering data, of evaluating the data, of consulting with other experts. The *Handbook's* analysts' entry mentions nothing about presenting future customers with analyses in person-to-person encounters, which the proffered position would clearly require of the beneficiary.

The duties of the proffered position instead more closely align themselves with those of the *Handbook's* marketing manager entry. The Department of Labor has placed the entry under the grouping, “Advertising, Marketing, Promotions, Public Relations and Sales Managers,” and specified that marketing managers “coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.” In a small firm, such as the petitioner's, a marketing manager becomes the liaison between the firm and any contractors hired to carry out ad or similar campaigns.

Marketing managers develop the firm's detailed marketing strategy, ...[and] 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.

The AAO concludes from the *Handbook's* entry requirements for marketing managers that the proffered position does not qualify as a specialty occupation. According to the *Handbook*, “a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations and sales managerial jobs,” with employers requiring both experience “plus a broad liberal arts background.” The *Handbook* continues:

[S]ome 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 and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.

Saying that a bachelor's- or master's-level degree in business administration with a marketing specialty is “preferred” falls short of the first criterion's requirement that a bachelor's degree “is normally the minimum

requirement for entry into the particular position.” As such, the petitioner has failed to satisfy the first criterion.

Regarding parallel positions in the petitioner’s industry, the petitioner submitted several Internet job postings for market analysts and related positions. Among them, however, none show that the employers that posted those listings are similar to the petitioner, or that the advertised positions are parallel to the proffered position. Of note instead are such ads as the one for “marketing coordinator,” requiring simply “a college degree;” for marketing administrative coordinator, requiring “a Bachelor’s Degree; for communications design manager, preferring a bachelor’s in design, journalism, English or communications; for a marketing specialist, requiring some college with a degree “a plus”; and for marketing manager, requiring a bachelor’s in marketing, sales, management or business development. Thus, the advertisements do not establish the requirement for a bachelor’s degree in a specific specialty. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. 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 second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner show that its degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that the position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. As previously discussed, the submitted Internet and other job postings do not establish that employers require a bachelor’s degree in a specific specialty. Thus, the evidence fails to establish an industry-wide requirement of a specific baccalaureate degree for a marketing manager position.

The third criterion requires that the employer establish that it normally requires a degree or its equivalent for the position. Turning 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 – as stated, the record does not indicate that the petitioner previously hired anyone for the proffered position; thus, this criterion has not been met.

The fourth criterion requires that the petitioner show that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. To the extent they are described in the record, the duties of the position are not so specialized or complex as to be associated with the attainment of a baccalaureate or higher degree in a specific specialty. The duties appear routine to the performance of a marketing manager occupation in the financial industry.

In regard to *Unical Aviation v. INS*, 248 F. Supp. 2d 931 (C.D. Cal. 2002), the case is distinguishable on several grounds. There, Unical had offered to hire the alien, a recent graduate with a bachelor’s degree in business administration with a concentration in marketing, for a senior market analyst post. The job title for the Unical position listed the job duties as follows:

- Gather data on past sales to predict future sales;
- Evaluate sales data and make recommendations to employers;
- Supply information to a company’s managers to make promotional, design and pricing decisions;

- Meet with airline and maintenance repair customers in China for supply of parts and services;
- Analyze and forecast airline and repair demand and generate plans to capture business;
- Provide after-sales services to customers in China;
- Develop new products and services for the China market;
- Do whatever supervisors or management from time to time assigns.

In granting Unical's summary judgment motion against the legacy Immigration and Naturalization Service (INS), the judge found the INS had reached its decision without comparing the job offer with an earlier marketing position the beneficiary had performed for another company that the INS had determined to qualify as a specialty occupation. The judge found Unical had submitted sufficient evidence to show that Unical normally requires at least a bachelor's degree for this position, thereby satisfying the third criterion. Unical had also submitted sufficient evidence that specialized study was an entry requirement for the Unical position. Also, on appeal, the judge found that the INS had determined the Unical job applicant to be qualified for the proffered position.

By contrast, the petitioner's evidence does not show that it had normally filled the position with a bachelor's degree holder in marketing. Further, most of the described duties for the proffered position are those typical of a marketing manager.

Furthermore, in contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

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.

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.