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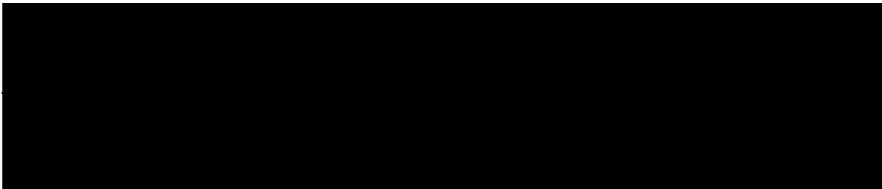


FILE: EAC 03 214 52799 Office: VERMONT SERVICE CENTER Date: NOV 09 2005

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 affirmed that decision in a subsequent motion to reconsider. 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 company that sells furniture. In order to employ the petitioner in a position it has designated for 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 initially denied the petition on the basis that the petitioner had failed to establish that the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director's decision on the motion for reconsideration affirmed the initial decision.

On appeal, counsel contends that the evidence of record establishes that the proffered position meets "at least 2" of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), namely:

- (1) [T]he degree requirement of a bachelor's degree in marketing or [a] related field is common to the marketing industry in parallel positions among similar organizations [the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)], and (2) the employer normally requires a degree or its equivalent for the position [the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)].

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is that of a market research analyst or any other occupational category that requires at least a bachelor's degree, or the equivalent, in a specific specialty. Accordingly, the director's decision to deny the petition was correct and shall not be disturbed.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's initial denial letter; (5) the matters constituting the beneficiary's motion for reconsideration of the director's denial of the petition; (6) the director's letter on his denial of the motion; and (7) the Form I-290B, counsel's June 17, 2004 letter stating the grounds of the appeal, and the documents attached to that letter.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

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.

Consonant 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." (Italics added.)

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.

CIS has consistently interpreted 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, CIS 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.

The July 10, 2003 letter of support submitted with the Form I-129 (Petition for Nonimmigrant Worker) includes this information:

The [petitioner] is a furniture sale company. We have successfully sold furniture and furniture fixtures for a long period of time within our state. We currently employ 8

individuals. Our gross annual income for 2002 was \$5,000,000.00 and our net annual income for 2002 was \$150,000.00. Our business has seen substantial growth over the past year and we anticipate that this growth will continue. We expand not only [the] number of our clients, but also [the] geographical areas where we provide our products. In doing that we rely on [the] experience and expertise of [the beneficiary], who helped us to increase our trade operations. [The beneficiary] is highly capable of organization of our sale activities. Our company has established a reputation as a solid provider of good quality furniture. It is essential for us to have a market research analyst to guide us through the market developments. It is very important for our company to know all market trends to satisfy [the] demands of our clients. It is highly important for us to be abreast of all new development[s] of the market in whole. To be able to achieve this goal we need a specialist in Market Research.

The petitioner's reply to the RFE included this list of proposed duties:

1. Collect, (phone interviews, database searches, independent analysis) tabulate and analyze market statistics
2. Collect, data[-]enter and disseminate relevant market information
3. Write, design and compile the Quarterly Market report
4. Create and write customized studies and reports
5. Oversee third party information vendor relationship
6. Monitor economic trends
7. Using mathematical models[,] predict the nature and length of business cycles, the effects of a specific rate of inflation on the economy
8. Study the requirements of various markets, the acceptability of products and methods of developing or exploiting new markets
9. Produce presentation materials for clients
10. Assist with marketing package development
11. Serve as primary contact for Public Relations activity
12. Develop a network of information sources
13. Prepare quantitative and qualitative market data reports

14. Collect information regarding channels of distribution, with promotion and pricing
15. Provide miscellaneous Advisor and Partner support

The document listing the proposed duties also states:

The job entails researching economic trends, and short and long term marketing decisions of [the] company; and marketing conditions in the local and regional areas [sic], to determine potential sales as well as development of research methods to gather data on competitors, pricing and prevailing conditions. The proposed duties are so multifarious and complex that the graduate education is required. The incumbent may earn advanced degrees in economics, business administration, marketing, statistics, finance, or [sic] some closely related discipline.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position 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.

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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, and, accordingly, considered the evidence of record in the light of the 2004-2005 edition of the *Handbook*. The AAO found that the evidence establishes that the beneficiary would be employed in the marketing field, but not that he would apply the level of specialized knowledge that is normally required for the market research analyst occupation as presented in the *Handbook*.

The *Handbook* indicates that employers of market research analysts normally require at least a master's degree in marketing or a related field. The 2004-2005 edition of the *Handbook*, at page 173, describes the employment of market research analysts as follows:

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. Market research analysts devise methods and procedures for obtaining the data they need

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

Because of the applicability of market research to many industries, market research analysts are employed in most industries

As a whole, the *Handbook's* information on market research analysts conveys that their work is characterized by the design and implementation of data-collection methodologies, data collection, and precise data analysis, at a level of expertise that most often requires a master's degree, as stated at page 174 of the *Handbook*:

In addition to being required for most market and survey research jobs in business and industry, a master's degree is usually the minimum requirement for a job as an instructor in junior and community colleges.

The information provided by the petitioner does not establish that the beneficiary's involvement with marketing would be on the specialized methodological and analytical level that characterizes market research analysts, or that her work would require a bachelor's or master's degree in marketing or a related specialty. The record provides no information about the specific research and analytic methodologies that the beneficiary would employ. There are no specific details about any of the job functions upon which the petitioner relies for specialty occupation status. The job and duty descriptions in the record convey no meaningful information about the specific tasks that would engage the beneficiary, or the knowledge, skills, and competencies she would have to apply. Examples of the lack of substantive evidence is found in the absence of details about: the statistical tabulations and analyses that the beneficiary would employ; the methodologies to be used to collect relevant market information; the nature of the beneficiary's Quarterly Market reports and the types of technical material to be included in them; the type of mathematical models that the beneficiary would employ; the nature of the market requirement studies proposed for the beneficiary; and the nature of the "quantitative and qualitative market data reports" that the beneficiary would prepare.

To the extent that they are described in the record, the proffered position and its duties generally align with the Advertising, Marketing, Promotions, Public Relations, and Sales Manager positions as described at pages 23-26 of the 2004-2005 edition of the *Handbook*. However, as reflected in this excerpt from the *Handbook's* "Training, Advancement, and Other Qualifications" subsection at pages 24-25, such positions do not normally require at least a baccalaureate degree or its equivalent in a specific specialty.

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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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. 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.

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.

For public relations management positions, some employers prefer a bachelor's or master's degree in public relations or journalism. The applicant's curriculum should include courses in advertising, business administration, public affairs, public speaking, political science, and creative and technical writing.

For all these specialties, courses in management and completion of an internship while in school are highly recommended. Familiarity with word processing and database applications also is important for many positions. Computer skills are vital because marketing, product promotion, and advertising on the Internet are increasingly common. The ability to communicate in a foreign language may open up employment opportunities in many rapidly growing areas around the country, especially in cities with large Spanish-speaking populations.

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. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

The job vacancy announcements submitted into the record are too few to establish normal recruiting and hiring practices for an occupation, and too few to rebut the information that the DOL has published in the *Handbook* about required educational credentials. Furthermore, these job advertisements are not inconsistent with the *Handbook's* information about the variety of educational/experiential backgrounds that employers find acceptable for sales and marketing positions.

As the generalized information to which the petitioner limited the record does not establish that the duties of the proffered position comport with those of a market research analyst or with any other occupation that normally requires at least a bachelor's degree, or its equivalent, in a specific specialty, there is no basis for a finding that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the director was correct in determining 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).

The first alternative prong assigns specialty occupation status to a proffered position that requires at least a bachelor's degree in a specific specialty that is commonly required by employers in the petitioner's industry that are similar to the petitioner when they hire for positions which are parallel to one proffered by the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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 discussed above, the petitioner has not established that its proffered position is any type for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, the record before the director did not include any submissions from a professional association or from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in a specific specialty. The record's job vacancy advertisements from other employers are not probative. They are too few to establish a common-to-the-industry hiring practice. The advertisements also exceed the scope of evidence relevant to this criterion, as the advertisers include employers outside the petitioner's industry (furniture sales), such as: a manufacturer/importer of industrial components for industrial markets; a company specializing in outdoors products; and a multi-billion dollar retailer of "office supplies, business services, furniture, and technologies from home-based businesses to Fortune 500 companies in North America and throughout Europe." Also, with regard to the few advertisers that compete exclusively in the furniture industry, the petitioner has not demonstrated that the proffered position and those advertised are parallel, as required by this criterion. The record does not contain sufficient information about the specific work performed in the proffered position and in the positions advertised.

As reflected in the discussion on the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the record's information about the proffered position and its duties is insufficient to establish that they are especially complex, specialized, or unique. Accordingly, the director was correct in finding that the petitioner had not satisfied either 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") or the provision at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) (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).

Finally, as the petitioner has not presented 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).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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.