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FILE: WAC 04 094 51726 Office: CALIFORNIA SERVICE CENTER Date: OCT 03 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 distributor of nutritional and health food supplements to Japanese customers, with 18 employees. It seeks to employ the beneficiary as a marketing research analyst 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 he determined the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

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 above criteria 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 petitioner seeks the beneficiary’s services as a marketing research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s February 7, 2004 letter of support; and the petitioner’s April 12, 2004 response to the director’s request for evidence, which indicates the proffered position would require the beneficiary to:

- Calculate and estimate the results of the petitioner’s past promotional events and marketing activities, and tabulate and create graphs and charts on the results, and plan new approaches for specific target regions accordingly; analyze sales and marketing records regarding the petitioner’s products to plan effective business strategies to better service customers and prospective customers (25 percent of the beneficiary’s time);
- Interface and negotiate with a manufacturer to plan new products and marketing campaigns based on health supplement market trends and changes in both the U.S. and Japanese market; plan and formulate promotional activities and advertising methods for the petitioner’s products in the United States and determine budget and cost allocations; research compliance with law and regulation to ensure that the petitioner’s products meet these requirements (25 percent of the beneficiary’s time);
- Conduct market research on competitors in the health industry; and identify their pricing, distribution, client base and formulate the petitioner’s supplement pricing and distribution methods correspondingly (15 percent of the beneficiary’s time);
- Compile past market data, forecast revenues, costs and sales growth; and identify existing and potential customers to develop new products and results resulting in innovative customer sales and billing options (10 percent of the beneficiary’s time);
- Prepare biannual marketing strategy reports; use computer databases and software applications to record past transactions, market trends, customer information and operation procedures; and use them to create and forecast new products (10 percent of the beneficiary’s time);
- Conduct surveys and analyze results on customer buying habits, preferences and trends to plan new products (10 percent of the beneficiary’s time); and
- Research industry-related events and attend annual health products conventions/trade shows in the United States to find new buyers and the best new products for Coco

Hawaii, Inc. and interface and liaise with management concerning new market strategies and promotional activities (5 percent of the beneficiary's time).

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 2004-2005 edition of the DOL *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 the type or complexity and scope to require a market research analyst. As discussed below, the AAO concurs in the director's finding that the proffered position is not that of a market research analyst. However, it finds the director to have misjudged the scope of the petitioner's business when he concluded that it did not extend beyond the local community and, therefore, did not have the consumer base to require the services of a marketing or sales staff. The record establishes that the petitioner has stores in Hawaii and Guam, and also sells its products over the Internet. Therefore, it is not a business operating within a neighborhood or part of a metropolitan area. The AAO also disagrees with the director's statement that the petitioner does not engage in the type of business for which a market research analyst would typically be required on a regular full-or part-time basis. In that 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 a retail business engaged in the selling of food supplements 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 section 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 marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicated that the beneficiary would be heavily involved in research related to expanding its business – the analysis of its sales and marketing records, the compilation of research on its competitors, the compilation of market data and the survey of customer buying habits – the beneficiary's market research responsibilities do not make him a marketing research analyst. The issue is not whether the proffered position requires the beneficiary to do market research, which it does, but whether it is that of a marketing research analyst and requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through a master's degree in business administration, marketing, statistics, communications, or other related field. (*Handbook* at page 174). As the petitioner does not indicate that the proffered position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, the proffered position is not that of a marketing research analyst.

Instead, like the director, the AAO finds the proffered position's duties to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies. 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* at pages 24-25, 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).

In reaching its decision, the AAO has also reviewed the two evaluations, which the petitioner has submitted to establish its degree requirement as an industry standard under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The first opinion comes from a business consultant to health-related companies who states that he has 25 years of experience in the field; the second from a professor at Mercy College in Dobbs Ferry, New York, who bases his opinion on his academic experience in the fields of marketing and business administration. In that both experts reviewed the duties of the proffered position and characterized it as a market research analyst, the AAO has evaluated whether these might also serve to establish the proffered position as a specialty occupation under the first criterion. They cannot.

While relevant to these proceedings, the opinions are unsupported by independent evidence substantiating the authors' expertise to evaluate the duties of the proffered position. While both individuals state their opinions are based on their extensive experience, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See 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)). Although the professor's opinion is accompanied by a letter from the chair of his college's business and accounting division stating his authority to award academic credit for employment experience, this authority is not probative in determining whether the proffered position is that of a marketing research analyst.

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. To establish its degree requirement as an industry norm, the petitioner has submitted 14 Internet job advertisements for employment related to market research analysis, materials discussing the employment of market research analysts from the State of California's and State of Michigan's websites, and "Monster.com," as well as the two previously discussed expert opinions. None of this evidence, however, establishes the petitioner's degree requirement as the norm within its industry.

Of the 14 job announcements submitted by the petitioner in response to the director's request for evidence, none appear to come from businesses that are similar to the petitioner, a distributor of nutritional and health food supplements. Accordingly, they fail to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations. The occupational guidance materials from California and Michigan, as well as that from "Monster.com" address the degree requirements for market research analysts when the record does not establish the proffered position as a market research analyst. Therefore, they are not probative for the purposes of these proceedings. The two expert opinions, which conclude that a baccalaureate degree in a directly related field is required for employment as a market research analyst, will also be discounted. As already noted, they are unsupported by independent evidence to establish their authors' authority to judge the educational requirements imposed by the petitioner's industry. *See 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)). Further, as the record does not establish the proffered position as a market research analyst, their conclusions regarding the degree requirements imposed by this occupation also lack relevance for these proceedings.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's request for evidence, the petitioner asserted it imposed a degree requirement on its entire professional staff, including its previous market research analyst, and listed the names and positions of four employees holding baccalaureate degrees. On appeal, the petitioner again asserts that all of its employees possess a baccalaureate degree in their area of expertise, or the equivalent in experience, and notes the documentation it has submitted to establish its normal employment practices. The AAO has reviewed the documentation provided by the petitioner regarding its employment practices, including the copies of the degrees held by the individual who previously held the proffered position, and three other individuals.

While the documentation submitted by the petitioner establishes its employment of the individuals it has identified as possessing degrees, it is insufficient to prove that the petitioner normally requires a degree for the proffered position. The copies of the degrees provided by the petitioner, with one exception, were

awarded by universities outside the United States and are not accompanied by evaluations from reliable credentials evaluation services establishing them as equivalent to U.S. baccalaureate degrees. Therefore, they cannot establish that the petitioner's normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position.

The AAO also notes that the degree awarded to the individual whom the petitioner has identified as previously holding the proffered position is in business administration. Even if documented as the equivalent of a U.S. baccalaureate degree in business administration, it would not satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). CIS does not recognize a generalized business degree that does not have a specific concentration in marketing, finance or some other specific area of business as a degree required to perform a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). As previously noted, CIS interprets the term "degree" 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. Although in response to the director's request for evidence, the petitioner stated that this individual's business degree was in both business administration and economics, the degree certification submitted to document his degree indicates only the award of a baccalaureate degree in business administration.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its 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. The petitioner has asserted that the duties of its proffered position – the identification of industry trends and consumer behavior based on complex market data and the development of marketing strategies to target consumers – would require the beneficiary to conduct economic research, statistical analyses and estimations, budgeting and forecasting, and econometric techniques. Such knowledge, it contends, comes only from a baccalaureate degree in economics or a closely related field. The AAO does not agree.

Upon review of the duties of the proffered position, the AAO has concluded that the position is closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.