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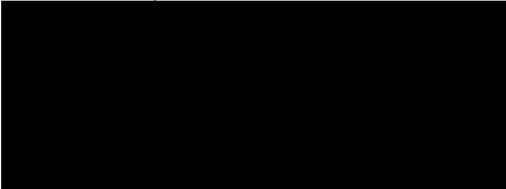
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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

D2



FILE: WAC 03 161 50512 Office: CALIFORNIA SERVICE CENTER Date: SEP 19 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 restaurant delivery business. It seeks to employ the beneficiary as an account manager 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 the record failed to establish that the proffered position is a specialty occupation and that the beneficiary is qualified to perform the services of 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.

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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, an appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

On Form I-129 and an accompanying letter the petitioner described itself as a delivery service for restaurants to off-site customers. The petitioner stated that it started operations in January 2000, had 16 employees and gross annual income of \$3.5 million at the time the instant petition was filed, and proposed to hire the beneficiary as a part-time account manager (20 hours/week) to perform the following duties:

- Research and evaluate existing restaurants and perform industry competitor analysis – 5 hours/week.
- Identify prospective restaurants and develop strategies to minimize penetration – 4 hours/week.
- Oversee developments or monitor trends that indicate the need for new services – 2 hours/week
- Analyze statistics to determine potential requirements and monitor the preferences of clients/customers – 3 hours/week.
- Implement strategies decided upon by management – 2 hours/week.
- Develop strategic partnerships and work plan to conduct planning assignment – 4 hours/week.

In response to the RFE the petitioner provided the following description of the proffered position:

Will communicate with the various restaurants in a professional manner, research market conditions, conduct organizational assessment to establish goals, objectives, specifications for clients, advise clients of issues facing organization that may influence the engagement; support the consulting process and be responsible for the accounts profitability.

According to the petitioner, the proffered position is a combination of two occupational categories described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* – a marketing manager and a market research analyst. Both occupations require a bachelor's degree for entry level positions, the petitioner asserts, thus qualifying the proffered position as a specialty occupation. The petitioner states that the beneficiary is qualified for the position by virtue of his baccalaureate level course of study, concentrating in insurance, which he completed in May 2000 at the Dimitar Apostolov Tzenov Academy of Economy in Svishtov, Bulgaria.

In his decision the director determined that the duties of the proffered position reflected those of a marketing manager, as described in the DOL *Handbook*, rather than the duties of a market research analyst. The director quoted excerpts from the *Handbook* indicating that a baccalaureate level of study in a specific specialty is not the normal, industry-wide minimum requirement for entry into that occupation. No evidence was submitted that a degree in a specific field of study is common to the petitioner's industry in parallel positions among similar organizations, that the proffered position is so complex or unique that a specialty degree was required to perform it, or that the petitioner normally requires a degree in a specific specialty or its equivalent for the position of account manager. Nor did the record establish that the duties of the proffered position are so specialized and complex that they could only be performed by an individual with baccalaureate level knowledge in a specific specialty. The director concluded that the proffered position did not meet any of the alternative criteria enumerated at 8 C.F.R. § 214.2

(h)(4)(iii)(A) to qualify as a specialty occupation. The director also found that the beneficiary was not qualified to perform the services of a specialty occupation because the record failed to establish that the beneficiary's foreign education, or his combination of foreign education and experience, is equivalent to a U.S. baccalaureate or higher degree in a specific specialty.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered 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. Sava*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). 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, Inc. v. Reno, id.*, at 1165-66.

On appeal counsel argues that regardless of whether the proffered position is categorized as a market research analyst or a marketing manager, the *Handbook* indicates that a baccalaureate degree is required to enter both occupational fields, thereby making the proffered position a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Counsel also contends that the proffered position qualifies as a specialty occupation under the alternative criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), (3), and (4), though no new documentation has been submitted. In addition, counsel asserts that the beneficiary's education is equivalent to a baccalaureate degree in marketing, thereby qualifying him to perform the services of the proffered position.

In the appeal brief counsel asserts that the petitioner has 116 employees, not 16 as stated by the director in the decision, "as evidenced by the organizational charts previously submitted with the response to the [RFE]." In fact, the only organizational chart submitted with the RFE shows just 14 employees, while a separate employee list submitted with the RFE identifies only ten employees. On Form I-129 the petitioner stated that it had 16 employees. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. See *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence. *Id.*

The occupation of market research analyst is described in the *Handbook*, 2004-05 edition, at 173:

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. 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 it 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.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are critical, not the title of the position. The petitioner must show that the performance demands of the position normally require a degree in a specialty for entry into the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

The AAO agrees with the director that the evidence of record does not establish that the duties of the proffered position are those of a market research analyst. The job description does not clearly indicate that the beneficiary would be performing typical market research duties such as devising methods and procedures for obtaining needed data, designing surveys, and conducting them by telephone, over the Internet, or in person. The petitioner's description of the proffered position contains only general references to "research[ing] and evaluat[ing] existing restaurants" or "market conditions" and "analyz[ing] statistics" without indicating how the research and analysis would be conducted. The research techniques utilized by market research analysts involve more complex tasks than are evident in the duties of the proffered position.

The AAO agrees with the director that the proffered position falls within the *Handbook's* occupational category of marketing managers. As described in the *Handbook, id.*, at 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.

With respect to the educational requirements of a marketing manager, the *Handbook* states as follows:

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.

Id. at 24. As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal, industry-wide requirement for entry into a marketing manager or sales manager position. Many employers give favorable consideration to a broad spectrum of degrees in hiring a marketing manager. Thus, a marketing manager does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement to enter into such a position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), there is no evidence in the record that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Nor does the evidence of record demonstrate that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. Accordingly, the proffered position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Accordingly, the petitioner cannot demonstrate that it normally requires a baccalaureate or higher degree in a specific specialty or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the evidence of record does not show that the duties of the proffered position are so specialized and complex that they require baccalaureate or higher level knowledge in a specific specialty. Accordingly, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the position proffered by the petitioner does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

Since the proffered position is not a specialty occupation, the issue of the beneficiary's qualifications to perform the services of a specialty occupation is inconsequential in deciding the instant appeal.

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.