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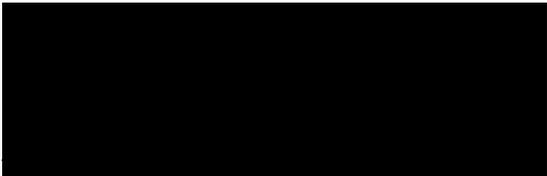
FILE: WAC 04 216 54316 Office: CALIFORNIA SERVICE CENTER Date: **AUG 02 2006**

IN RE: Petitioner:
Beneficiary:



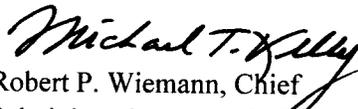
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

for 
Robert P. Wiemann, Chief
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 a bottling and packaging equipment manufacturer and distributor that seeks to employ the beneficiary as a "Marketing Coordinator Level 1." The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 a "strategic marketing planning report" prepared by the beneficiary.

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.

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 Coordinator Level 1." Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 16, 2004 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: participating in the planning and designing of surveys, questionnaires, and other methods and procedures to obtain market data; conducting interviews, surveys, and tests to assess customer preferences, to study consumer reaction to new products and package design, and to measure the effectiveness of advertising; gathering data on competitors and performing initial analysis of prices, sales, and methods of marketing and distribution; collecting and summarizing statistical data on past sales for the CEO to forecast future sales; assisting in the development and distribution of information related to the petitioner's new products; and providing management with information needed to make marketing-related plans. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree or higher in business administration, marketing, or an equivalent thereof.

The director found that the proffered position, which is similar to a marketing manager, was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2004-2005 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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, in part, that the proffered position is similar to that of market and survey researchers, and is not a marketing manager position. Counsel also states that according to the *Handbook*, market and survey researchers require at least a master's degree. Counsel also states that the proposed duties are so specialized and complex as to require a baccalaureate or higher degree.

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 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

At the outset, the AAO notes inconsistencies regarding the number of people that the petitioner employs. Information on the petition that was signed by the petitioner's CEO on June 18, 2004, reflects that the petitioner was established in 1996, and has 10 employees and a gross annual income of \$1.6 million. The petitioner's most recent quarterly wage report for the quarter that ended on June 30, 2004, which was submitted in response to the director's request for additional evidence, reflects only six employees for June 2004. Further, the petitioner's 2003 federal income tax return reflects no salaries and wages paid. In view of these conflicting numbers, the petitioner's organizational hierarchy is not clear. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such

inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO routinely consults 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 that of a market and survey researcher. In response to the director's request for additional evidence, the petitioner asserted that the beneficiary would spend 40% of her time in market research, 40% in proposal development, and 20% in advertising and promotional materials. Although the petitioner submits a "strategic marketing planning report" prepared by the beneficiary, the record contains no evidence of any surveys or questionnaires designed by the beneficiary. The petitioner has not demonstrated that the proposed job duties entail the level of responsibility of market and survey researchers. See the *Handbook*, 2006-2007 edition under Market and Survey Researchers. A review of the Advertising, Marketing, Promotions, Public Relations, and Sales Managers occupational category in the *Handbook* finds that the job duties parallel the general responsibilities that the *Handbook* describes for this occupational category of these positions. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for advertising, marketing, promotions, public relations, and sales managers jobs. Moreover, even if the AAO were to conclude that the proffered position is a market and survey researcher position, the proffered position would still not qualify as a specialty occupation because the 2006-07 *Handbook* does not indicate that a bachelor's degree in a specialty is normally required for a marketing research analyst position.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for marketing-related positions. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The advertisements are for marketing positions in the following industries: music and entertainment retail; staffing; book marketing; heating/air conditioning contracting; auditing and tax advisory; marketing; and law. The petitioner's industry, however, is not represented. Further, the majority of the advertisements do not stipulate the requirement of a bachelor's degree in a specialty, and one of the advertisements stipulates that, while a bachelor's degree is preferred, an associate's degree is required. Thus, the advertisements are not probative.

The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Further, the record of proceeding contains no information about the proffered position to establish it as a specialty occupation by virtue of complexity or uniqueness that necessitates at least a bachelor's degree level of knowledge in a specific specialty. The duties comprising the position are described at a generic and generalized level. They do not establish concrete dimensions of actual work that would engage the beneficiary. Consequently, there are no details to show complexity or uniqueness necessitating a degree.

The petitioner, therefore, has 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. As the proffered position is a new position, the petitioner, therefore, has not established the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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

The proposed duties are described in generalized terms that do not demonstrate the level of specialized knowledge that may be required to perform them. Consequently, 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).

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.