

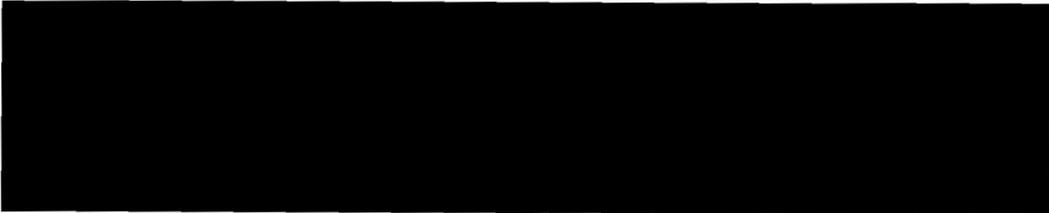
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U.S. Citizenship
and Immigration
Services

D2



FILE: WAC 04 258 51164 Office: CALIFORNIA SERVICE CENTER Date: **APR 05 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 Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of 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 retailer and installer of floor coverings that seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, 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 on the basis of his finding that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 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 proposed position.

In its September 22, 2004 letter of support, the petitioner stated that the beneficiary would spend ten percent of her time analyzing and researching market conditions, at both the national and international levels, to help the petitioner determine potential sales of products and services; ten percent of her time establishing research methodology and designing formats for data gathering, such as surveys, opinion polls, or questionnaires; ten percent of her time using the results of these surveys to create a marketing campaign based upon regional preferences; ten percent of her time interpreting the petitioner’s data concerning expenditures, prices, and future trends through daily statistical reports, utilizing knowledge of research and statistics technology to recommend improvements to its methods of operation and marketing; ten percent of her time examining and analyzing statistical data to forecast future marketing trends; ten percent of her time analyzing business trends and developing strategies to help the petitioner project future revenues; ten percent of her time gathering data on competitors and analyzing processes, sales, and methods of marketing and promotion; ten percent of her time preparing a comprehensive marketing study of local industries and competitors in the surrounding areas; ten percent of her time determining the advisability of adding new lines of services, opening new branches, or otherwise diversifying the company’s operations; five percent of her time tapping new markets and introducing innovative packages and services; and five percent of her time checking consumer reactions to new or improved products or services.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. 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.

In his denial, the director, relying on the 2004-2005 edition of the *Handbook*, found that many of the duties of the proposed position reflect the employment of a market research analyst, but concluded that the record failed to establish that the petitioner’s business was of the type or complexity to require a market research analyst. While, as discussed below, the AAO concurs in the director’s ultimate finding that the proposed position is not a specialty occupation, it does not agree with the reasoning that led him to his conclusion.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity or operate the type of business that would require a marketing research analyst. The *Handbook* indicates that the work of market research analysts is applicable to many industries and that they are employed throughout the economy. In that market researchers are concerned with the

potential sales of products or services and provide a company's management with the information needed to make decisions on the promotion, distribution, design and pricing of products or services, the petitioner's need for marketing research may not be discounted based on a lack of organizational complexity or its type of business. The fact that the petitioner is a retailer and installer of floor coverings does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of identifying business opportunities. Therefore, the AAO withdraws the director's findings in this regard.

The 2006-2007 edition of the *Handbook* states the following with regard to the employment of market research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze statistical data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussion, 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 and evaluating the data, market research analysts 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 also may 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 *Handbook* states the following with regard to the educational qualifications necessary for entry into this field:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree may be required, especially for technical positions, and increases opportunities for advancement to more responsible positions. Also, continuing education is important in order to keep current with the latest methods of developing, conducting, and analyzing surveys and other data. Market and survey researchers may earn advanced degrees in business administration, marketing, statistics, communications, or some closely related discipline. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are

extremely helpful. Many corporation and government executives have a strong background in marketing.

As the *Handbook* finds that market research analyst positions impose no specific degree requirement on individuals seeking employment in the field, the petitioner cannot establish that its proposed market research analyst position requires the beneficiary to hold a baccalaureate or higher degree, or its equivalent, in a specific specialty. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The petitioner does not indicate that the market research analyst position in this case is a technical position requiring a master's degree. To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As noted previously, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position. Accordingly, the petitioner has not established its proposed position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. The petitioner must also establish that the degree commonly required is in a specific specialty.

There is no evidence in the record to establish that any of the job postings are from companies similar in size and scope of operations to the petitioner, a retailer and installer of floor coverings with seven employees.¹ Structural Graphics designs three-dimensional marketing products, Bearing Point is an accounting firm, CompUSA is a computer retailer, Lowe's Companies, Inc., is a home improvement retailer with 975 stores in 45 states, Smith Hanley is a consulting firm, and Hunter Douglas manufactures and markets window coverings and architectural products. No information was submitted regarding the unnamed company advertising its notice of vacancy through HTR, America's Lending Partners, Boston Scientific, Asia Pearl, or the EIS Fabrico Division. No evidence has been submitted to demonstrate that the petitioner and any of these companies are "similar organizations."

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is similar to the market research analyst position described in the *Handbook*, which does not require a degree in a specific field.

¹ While the petitioner indicated on the Form I-129 that it has 15 employees, the payroll records and list of employees submitted on appeal reflect seven employees.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. No evidence has been submitted to verify that the proposed position qualifies as a specialty occupation under this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to require a higher degree of knowledge and skill than that normally expected of non-technical market research analysts who routinely undertake a range of demanding and complex business activities. Therefore, 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. There is no information in the record to support a finding that the proposed position is more specialized and complex than the market research analyst positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. The duties as described by the petitioner do not reflect a higher degree of knowledge and skill than would normally be required of market research analysts who routinely work in highly complex environments. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will not disturb the director's denial of the petition.

Beyond the decision of the director, the petition may not be approved for another reason. The petitioner's failure to obtain a certified labor condition application (LCA) prior to filing the petition precludes its approval.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The instant petition was received at the service center on September 24, 2004, but it did not contain a certified LCA. Rather, the petition contained an uncertified LCA and a facsimile transmittal sheet, as evidence that counsel had submitted an LCA to the Department of Labor for certification. As such, the director requested a certified LCA in his October 4, 2004 request for evidence. In response, counsel

submitted an LCA that had been certified on September 28, 2004, or four days after the petition was received at the service center.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition “[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary.” Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

Although a certified LCA was submitted, the failure to procure it before filing the H-1B petition precludes the petition’s approval, and there is no provision in the regulations for discretionary relief from the LCA requirements. For this additional reason, the petition may not be approved.

Finally, counsel asserts that CIS has already determined that the proposed position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in the records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proposed position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of those petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO’s authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff’d*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.