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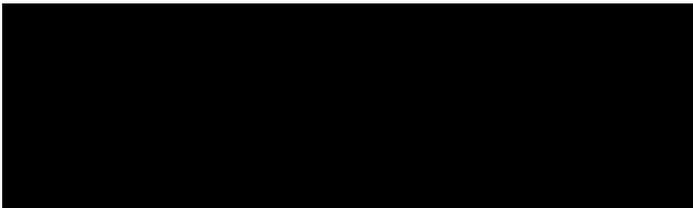
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FILE: SRC 04 231 51275 Office: TEXAS SERVICE CENTER Date: **JUN 05 2006**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 beer and wine importer. It seeks to employ the beneficiary as market research analyst 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 ground that the record failed to establish that the proffered position qualifies as 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.

The petitioner describes itself as an importer of wine and beer from Australia, Argentina, Chile, Hungary, New Zealand, and South Africa, and a wholesaler to hotels, restaurants, and wine stores. On its Form I-129 the petitioner stated that its business was established in March 2003, had four employees at the time of filing in August 2004, and projected gross annual income of \$700,000. In an accompanying letter the petitioner indicated that it wished to employ the beneficiary as a market research analyst for three years, and described the job duties as follows:

[The beneficiary] will be responsible for: the development and sales of Schwartzberg Imports for the South American division; development and implementation of marketing plans nationally and internationally; creating and introducing company brand programs and strategies; insuring that accounts are going through proper trade channels; coordinating account activity with distributors; expansion of distribution in the U.S. within the Spanish community; communication with foreign financial institutions; conducting educational wine seminars and staff training.

According to the petitioner, the minimum educational requirement for the proffered position is a bachelor's degree in business administration, or a closely related specialty. The beneficiary is qualified for the position, the petitioner declares, by virtue of his bachelor of business administration, with a major in management, from the University of Houston, granted on December 15, 2002.

In response to the RFE the petitioner supplemented its original job description with additional details about the duties of the proffered position. It reads as follows:

In order to perform [his] broader general duties, that focus on development, implementation, creation, and introduction of our products and services not only in South America but in the United States as well, [the beneficiary] will be required to spend a majority of his time performing market research analysis. Specifically, [he] will be required to design and execute research surveys to address the growing needs of our company by researching market conditions in markets throughout South America and the United States; gather information on competitors' prices, sales, and methods of marketing and distribution; assure that the surveys he conducts provide reliable information; analyze and prepare reports of strategies; communicate these research results effectively both in the written reports and orally; and create, develop, and maintain research databases. It is only after performing these duties that he will be able to focus on the broader duties previously described. Furthermore, because of the fact that market conditions are constantly changing, [the beneficiary] will have to constantly update previous analysis and conduct new analysis as our business expands into new markets. As our company grows, it is our hope that we will be able to hire additional marketing and sales representatives who will be able to focus on [the beneficiary's] broader duties, allowing him to focus his full attention on market research analysis.

In her decision the director indicated that, while some market analyst positions could be considered specialty occupations, the petitioner failed to establish, in the context of its particular business operation, that a baccalaureate or higher degree is the minimum educational requirement to perform the duties of the proffered position. The evidence of record did not establish that a baccalaureate degree is commonly required by the industry in parallel positions among similar organizations, the director stated, or that the

proffered position is so complex or unique that it can only be performed by an individual with such a degree. 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.

On appeal counsel reiterates the petitioner's contention that the beneficiary will be performing the duties of a market research analyst in the proffered position, quoting the augmented job description in the response to the RFE. Counsel refers to information in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* that market research analysts require a baccalaureate or higher degree, thus qualifying the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Counsel also asserts 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) and (4), based on the petitioner's characterization of the complex, unique and specialized nature of the position and its duties.

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.

The occupation of market research analyst is described in the *Handbook*, 2006-07 edition, as follows:

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 discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of 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.

With respect to the educational requirements for market research analysts, the *Handbook, id.*, states the following:

A bachelor's degree is the minimum educational requirement for many market . . . research jobs. However, a master's degree may be required, especially for technical positions Market and survey researchers may earn advanced degrees in business administration, marketing, statistics, communications, or some closely related discipline.

Based on the foregoing information, the AAO concludes that a baccalaureate or higher degree in a specific specialty is not the normal minimum requirement for entry into a market research analyst position. Though master's degrees in certain specialty fields may be necessary for some positions, baccalaureate degrees in a variety of disciplines may be a sufficient for entry into many market research positions. Accordingly, market research analysts do not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Based on the evidence of record, however, the AAO determines that the duties of the proffered position are not those of a market research analyst. In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are dispositive, 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 job description of the proffered position contains only general references to "design[ing] and execut[ing] research surveys . . . [on] market conditions," to "gather[ing] information on competitors' prices, sales, methods of marketing and distribution," to "preparing reports of research findings," to "creat[ing], develop[ing], and maintain[ing] databases," without providing any details about the substantive content of such activities or how the research and analysis would be conducted. The petitioner has provided few specifics about the types of surveys to be conducted, the types of data to be collected, and the types of analysis the beneficiary would present to management. The petitioner must do more than simply recite certain job duties of a market research analyst in the *Handbook*. It must show how those job duties will be performed in relation to its own business. Simply going on record without supporting evidence does not satisfy the petitioner's burden of proof. *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)). Accordingly, the record does not establish that the proffered position would require the beneficiary to perform as a market research analyst.

Based on the petitioner's description of the job duties, the AAO determines that the proffered position accords with the *Handbook's* description of a marketing manager. That occupation is described in the *Handbook*, 2006-07 edition, as follows:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates . . . they estimate 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 to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. . . . [T]hey monitor trends that indicate the need for new products and services and they oversee product development

With respect to the educational requirements of the occupation, the *Handbook, id.*, states the following:

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.

. . . .

Most . . . marketing . . . management positions are filled by promoting experienced staff or related professional personnel

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 position. Many employers give favorable consideration to a broad spectrum of degrees in hiring for such a position, and many positions are filled based on the applicant's relevant work experience. 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 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), the record includes eight internet job advertisements for market research analysts, all of which require a baccalaureate or higher degree. None of the advertising companies is in the same line of business as the petitioner, however, and most or all of the companies appear to be far larger than the petitioner in their scale of operations. Thus, the internet job announcements do not establish that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). 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, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to 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 the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. The documentation of record does not establish that the duties of the

position exceed the scope of an entry-level marketing manager, for whom baccalaureate level knowledge in a specific specialty is not normally required. Thus, the 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). 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).

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.