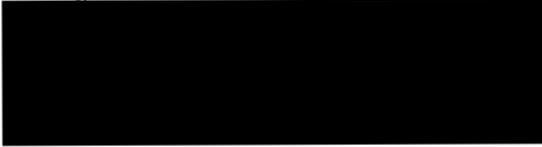


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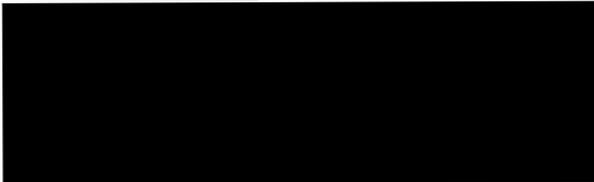
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FILE: EAC 04 250 54105 Office: VERMONT SERVICE CENTER Date: **JUL 18 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The acting director of the Vermont 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 an online procurement information provider, with two employees. It seeks to employ the beneficiary as a marketing 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 she 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) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's letter and additional documentation. 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 analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s September 1, 2004 letter in support of the petition; the petitioner’s May 24, 2004 employment contract with the beneficiary; and counsel’s September 23, 2004 response to the director’s request for evidence. This evidence indicates that the duties of the proffered position would require the beneficiary to:

- Conduct and manage the Marketing Assistance Program, e.g., the [REDACTED] designed to assist U.S. companies in sourcing partners in Korea for IT (LCD & hard drives) and security (DVR/CCTV cameras and fingerprint ID) products of select Korean small and mid-sized companies sponsored by Korean government agencies, [REDACTED] product/brand marketing, sales channel development);
- Prepare the marketing package, such as brochures, catalogs and presentation materials, for promoting to potential business partners and customers (product/brand marketing);
- Identify and design market research objectives embedded within international business, the U.S. government/commercial procurement marketplace and e-business, including event and conference information;
- Provide detailed analysis that assists U.S. vendors and business partners to find quality international companies and that helps global companies enter the U.S. government/commercial marketplace;
- Develop and implement marketing strategies and sales distribution channels;
- Develop business relationships for teaming and subcontracting, joint-marketing, sales representation, distribution, [REDACTED] and perform initial marketing activities to identify sales opportunities, prospects and to develop strategic action plans for the next steps;
- Arrange face-to-face meetings/events between domestic and international business partners; and
- Manage customer service including technical troubleshooting help, complaints, subscription and fees [REDACTED]

The petitioner states that the proffered position requires knowledge normally associated with a baccalaureate degree in marketing or a related field.

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 her denial, the director, relying on the 2004-2005 edition of the *Handbook*, concluded that the duties of the proffered position were most closely aligned with those of a public relations specialist, not those of a market research analyst. Based on her review of the record, the director determined that the record failed to establish that the petitioner's business was of the type to hire 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 erred in concluding that the petitioner is not engaged in the type of business that would require a marketing research analyst. In that the *Handbook* indicates that the work of marketing research analysts is concerned with the potential sales of products or services 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 small online business providing government procurement information to its clients 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. Accordingly, the AAO withdraws the director's finding in this regard.

Although the petitioner has given the proffered position the title of market analyst, its discussion of the position's duties does not align with that provided by the *Handbook* regarding the employment of market or marketing research analysts. Marketing research analysts gather statistical data on competitors; examine prices, sales, and methods of marketing and distribution; and analyze data on past sales to predict future sales.¹ Accordingly, the proffered position is not that of a market research analyst.

On appeal, counsel offers a detailed description of the tasks that would be performed by the beneficiary in carrying out the duties previously described by the petitioner, emphasizing those needed to support the petitioner's Marketing Assistance Program and its connection to the Korean nonprofit/government agency and Small Business Corporation. She states that to carry out his duties in relation to the Marketing Assistance Program, the beneficiary would be required to identify and develop "business relationships with U.S. partners/distribution channels to develop sales opportunities/orders of Korean products." She further indicates that he would be required to develop relationships with appropriate marketing specialists or

¹ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/oco/ocos013.htm.

consulting companies that could help and lead the sales of Korean products in the United States, and would be expected to find appropriate U.S. business partners for Korean clients, identifying marketing targets, identifying, surveying and contacting potential buyers and demonstrating clients' products/solutions to these organizations.² Moreover, the beneficiary would be required to produce marketing packages of clients' brochures, catalogs and presentation materials for U.S. promotion purposes. Therefore, although the petitioner has indicated that the beneficiary would also perform some limited customer service function, his role within the petitioner's organization, as presented by counsel, would be one of marketing the products/services of Korean clients to U.S. vendors that contract with U.S. government agencies.

While the AAO notes that counsel also states that the beneficiary would analyze product lines or industries in the U.S. government market to provide information on "supplemental trends and status, competition, list of major contractors and suppliers," this research activity is not described in terms that reflect the type of analyses performed by market researchers. Instead, as presented, it appears to indicate the collection, rather than the analysis, of industry-related information needed to support the petitioner's marketing activities.

Accordingly, the AAO finds the proffered position, as described in the record, to outline responsibilities that describe the work of marketing managers and market research managers, employment discussed by the 2006-2007 *Handbook* under the occupational titles of advertising, marketing, promotions, public relations and sales managers. As reported by the *Handbook*:

[A]dvertising, 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 in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets Marketing managers develop pricing strategy to help firms maximize profits and market share 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 they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users

The AAO notes that the Internet job listing posted for the proffered position also describes the position as that of a marketing manager.

With regard to the preparation required for employment as a marketing manager, the *Handbook* reports the following:

² Counsel's discussion of the specific tasks to be performed by the beneficiary is supported by the job description included in the job announcement submitted by the petitioner in response to the director's request for evidence.

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. In highly technical industries, such as computer and electronics manufacturing, a bachelor's degree in engineering or science, combined with a master's degree in business administration, is preferred.³

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 petitioner has not established the proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove either 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. In the instant case, the petitioner has provided eight Internet job advertisements for marketing analysts as proof that its degree requirement for the proffered position is the norm within its industry. However, none of these announcements respond to the requirements of the criterion's first prong. Of the seven, none are published by organizations that are established as similar to the petitioner, an online provider of government procurement information. Neither do they describe positions that may be considered parallel to the proffered position.

With regard to the second prong, the record offers no evidence that the proffered position may be distinguished from similar non-degreed employment based on its unique nature or complexity. Accordingly, the petitioner has not established the proffered position as a specialty occupation under either prong of the second criterion.

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. However, in the instant case, counsel, in response to the director's request for evidence, indicated that the proffered position is

³ *Occupational Outlook Handbook*, 2006-2007 Edition, at www.bls.gov/ococos013.htm.

newly created. Accordingly, the petitioner cannot establish that it normally requires a degree when filling the proffered position.

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. Therefore, to establish the proffered position as a specialty occupation, the petitioner must distinguish the duties to be performed by the beneficiary from those of a typical marketing manager, employment that the *Handbook* indicates does not normally impose a degree requirement.

On appeal, counsel contends that the duties of the proffered position, particularly those related to the petitioner's Marketing Assistance Program, require not only that the beneficiary have marketing skills and knowledge but also have international business knowledge to be able to communicate with private industry clients and Korean government agencies and business associations. While the AAO agrees that the international nature of the petitioner's services could result in more complex marketing responsibilities, the record does not establish that the beneficiary would be required to have greater knowledge and skill than that possessed by other marketing managers who routinely work in highly complex and competitive environments. It does not address or document the type or extent of the international business knowledge that counsel states would be required of the beneficiary in connection with the petitioner's Korea-based clients. Without such evidence, counsel's assertions are not persuasive. Without documentary evidence to support the claim, the assertions of counsel are not sufficient to meet the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The Internet job listing for the proffered position also undermines the petitioner's ability to establish the proffered position as a specialty occupation under the fourth criterion. It indicates only that the petitioner would prefer a degree "related to marketing or having sales/marketing experience in the U.S." not that it requires a degree for the proffered position. In that the petitioner has published a job announcement for the proffered position that does not require a degree in a directly related field, its contention that the duties of the position satisfy the specialized and complex threshold of the fourth criterion is not persuasive. Accordingly, the record does not establish the proffered position 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.