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U.S. Citizenship
and Immigration
Services

102

FILE: WAC 04 056 51362 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 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 director of the California 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 accounting firm, with five employees. It seeks to employ the beneficiary as a market research 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 based on his determination that the record failed to establish the proffered position as 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; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief, and new and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job 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 states that it is seeking the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129 and the petitioner’s December 12, 2003 letter of support. As stated by the petitioner, the responsibilities of the proffered position would require the beneficiary to:

- Evaluate strategic marketing opportunities for service development, including analyzing industry market size, segmentation, competition, trends and key activities;
- Assist management in providing the market research needed to support on-going operations in the areas of service positioning and development, advertising, clients wants/needs and other competitive activities;
- Act as a liaison with client-employers to coordinate programming, fielding, coding and data processing such that each phase of the petitioner’s projects and/or activities is overseen, and that details are communicated efficiently and effectively, minimizing error and time applied;
- Analyze, develop and maintain effective client/customer information methods and systems that are necessary to transform market research data into clear marketing and promotional recommendations;
- Gather vital data respecting the petitioner’s competitors, analyzing their service methods; and conduct evaluations of their techniques in marketing, promotion and distribution to determine the advisability of using new approaches in the petitioner’s desired markets;

- Design telephone, personal or main interview surveys to assess customer/client preferences and to formulate recommendations for maintaining service quality appreciation to customers and clients; and
- Conduct opinion research to determine public attitudes and acceptance of the petitioner's products and services to create a marketing campaign.

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 his denial, the director indicated that he did not find the record to establish that the beneficiary would be employed as a market research analyst by the petitioner, determining that the petitioner's business did not have the scope to require the services of a market research analyst, nor the organizational complexity to support one. He further concluded that the petitioner did not operate the type of business in which market research analysts are typically employed. The director also found the record failed to establish the proffered position as a specialty occupation under any of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). While the AAO agrees, as discussed below, that the petitioner has failed to demonstrate that the proffered position qualifies as a specialty occupation, it finds the director to have erred in determining that the petitioner's size, structure and type of business preclude it from employing a market research analyst.

The 2006-2007 edition of 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. As a result, the AAO finds market research to be applicable to virtually any industry or business seeking to improve its market share and profits. The fact that the petitioner is an accounting firm does not prohibit it from engaging in the type of market research activities described by the *Handbook*. Accordingly, the AAO withdraws the director's finding in this regard.

However, while the AAO finds that the petitioner's is a business that may require the services of a marketing research analyst, it does not find the record to establish that the proffered position, as outlined by the petitioner, is that of a market research analyst. As described by the 2006-2007 *Handbook*, market or survey researchers, also known as market or marketing research analysts are:

[c]oncerned 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 data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need

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. [*Handbook* at page 175].

The AAO finds the above discussion to be reflected in the petitioner's description of several of the proffered position's duties – gathering data on the petitioner's customers, designing surveys to assess customer preference and conducting opinion research. It concludes that the other duties – evaluating strategic marketing opportunities, and analyzing and developing client/customer information methods – are typical of those performed by marketing managers.¹ However, the petitioner's description of the position outlines the type of duties typically performed by market research analysts and marketing managers, rather than the specific tasks to be performed by the beneficiary in relation to the petitioner's accounting business.

A petitioner cannot establish a proffered position as a specialty occupation by listing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title. While this type of generalized description is necessary when defining the range of duties that may be performed within an occupation, it cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties or tasks to be performed by a beneficiary in relation to its particular business interests.

The AAO requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case offers no description of the proffered position's day-to-day responsibilities in relation to the petitioner's accounting business, it does not establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel submits an advertisement for the petitioner's services and a listing of its individual and business clients as proof of the petitioner's need to conduct market research. However, the relevance of this

¹ One duty appears to fall outside the general marketing focus of the proffered position. It requires the beneficiary to serve as a liaison between the petitioner and its clients, coordinating programming, fielding, coding and data processing. Based on the petitioner's limited discussion of this responsibility, the AAO is unable to identify the nature of the employment it describes.

documentation to the petitioner's need for the services of an in-house market researcher is not clear and counsel does not offer an explanation in his brief. Moreover, as the submitted material offers no additional definition to the petitioner's generalized description of the proffered position's duties, it is of little evidentiary value in establishing the proffered position as a specialty occupation.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove (1) that a specific degree requirement is common to its industry in parallel positions among similar organizations or (2) that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the petitioner has provided no evidence that responds to either of the criterion's prongs. Moreover, the petitioner's failure to provide a specific and detailed description of the proffered position's duties precludes it from establishing the proffered position as parallel to any degreed positions within similar organizations in its industry or distinguishing it as more complex or unique than similar, but non-degreed, employment.

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 the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually 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. The record, however, offers no evidence of the petitioner's hiring practices regarding the proffered position. Accordingly, the proffered position is not established as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to prove that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. However, the petitioner has failed to provide a meaningful description of the proffered position's duties and is, therefore, prevented from establishing them as being of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the basis for its denial of the instant petition differs from that of the director who determined the proffered position to be that of a marketing manager, employment that does not impose a degree requirement on those seeking entry-level employment. [*Handbook* at page 27]. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

For the reasons discussed above, the petitioner has failed to establish the proffered position as a specialty occupation. Accordingly, the AAO will 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 met that burden.

ORDER: The appeal is dismissed The petition is denied.