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U.S. Citizenship and Immigration Services
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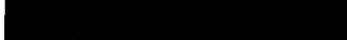
U.S. Citizenship
and Immigration
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FILE: EAC 07 138 52363 Office: VERMONT SERVICE CENTER Date: **NOV 04 2009**

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.

Perry Rhew
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 corporation that describes itself as “a company engaged in various activities such as retail trade and investment, real estate and hospitality services.” In order to employ the beneficiary in a position that it has designated as a market research analyst, the petitioner endeavors to classify the beneficiary as a temporary 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).

In denying the petition, the director found that the petitioner failed to provide sufficient evidence to establish that the particular marketing analyst position for which the petition was filed is a specialty occupation. The director’s decision states, in part:

At issue in the instant petition is the position as set forth by the petitioner. The position of “marketing analyst” may be considered a specialty occupation, but the duties must be so complex as to necessitate a baccalaureate degree.

The duties of the position did not seem to be so complex, unique or specialized as to require a four[-] year baccalaureate degree. Therefore, additional evidence was requested on May 30, 2007.

In response to this request, you have submitted a statement from counsel of record, and tax returns, and forms for not only the petitioning entity, but also for businesses purportedly owned by the same individual. The petitioning entity in this case is Nida Inc. Evidence presented in connection with the petitioning entity will be considered.

You were requested to submit documentation highlighting the nature, scope and activity of your business in order to establish the beneficiary will be employed with the duties you have set forth.

The petitioner has failed to submit adequate documentation highlighting the nature, scope, and activity of the business and it is therefore impossible to establish that the duties are so complex, unique, or specialized as to require a four[-]year baccalaureate degree. The evidence submitted consists of tax returns for the years 2004, 2005 and an extension for 2006, Form[s] 940 and 941 and Texas Employer’s Quarterly Report.

In its March 21, 2007 letter filed with the Form I-129, the petitioner describes the proffered position as follows:

POSITION OFFERED

Our current operation is in need of a Market Research Analyst to study and analyze our markets, customers, and competitors. Thus, we are offering [the beneficiary] the position of a Market Research Analyst. The petition holder will perform the following duties:

Research market conditions in [the] local, regional, or national area to determine potential sales of product or service: Establish research methodology and design format for data gathering, such as surveys, opinion polls or questionnaires. Examine and analyze statistical data to forecast future marketing trends. Gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Collect data on customer preferences and buying habits. Prepare reports and graphic illustrations of findings.

This March 21, 2007 letter and counsel's August 23, 2007 letter replying to the RFE indicated that the focus of the beneficiary's duties would include work for the other member entities of the Ahmed Group of Industries (AGI). In response to the director's finding that only duties performed for the petitioner are relevant, on appeal the petitioner focuses exclusively on the duties that the beneficiary would perform for the petitioner itself, and expands the details about those duties to indicate that the beneficiary's marketing research analysis work would focus on the development and eventual marketing of a new ethnic food product.

On appeal, counsel submits a Form I-290B and copies of several documents, including (1) a three-page document entitled "Ahmed Group of [C]ompanies"; (2) an article from Food Review, entitled "America's Changing Appetite: Food Consumption and Spending to 2020"; (3) a four-page essay entitled "Evolving Food Trends"; (4) resumes of the beneficiary and others identified as part of his project team; (4) a group of documents, such as a certificate of limited partnership, limited partnership agreement documents, and bank account summaries dealing with the limited partnership entered under the name A 3 H Foods, LP.

The three-page document entitled "Ahmed Group of [C]ompanies" indicates that the petitioner corporation belongs to a "diverse group of companies ranging from real estate to food service" that is known as AGI. According to this document, as one of the AGI entities, the petitioner "plans to follow an aggressive growth strategy and double its size within the next five years by new construction and acquisitions." The document states that, as part of its growth strategy the petitioner "has planned to add an ethnic based food brand on the fast growing food industry trends towards consumption of ethnic flavored foods." Towards this end, the document states, the petitioner has "created a research and development department" where the beneficiary will "spearhead" the development of the petitioner's new food product. The document further states that, as Project Director, the beneficiary will be "[i]n charge of research and development of the new ethnic food brand and then marketing of the product after development." This document also identifies by name the persons who will be responsible for the

following areas of the project, under the beneficiary's leadership: food service operations, real estate and construction, and strategic decisions and planning. The AAO observes that the three persons the "Ahmed Group of [C]ompanies" document identifies as working with the beneficiary on the Project Team comprise three of the four members of the A 3 H Foods limited partnership which the petitioner documents on appeal. In the Form I-290B, the petitioner states, in part, that the success of the new food project "depends on understanding the market and its trends and using the information to develop a quality product that is in demand as well as being economically feasible."

As will be discussed below, the AAO finds that the evidence of record does not establish that the proffered position qualifies as a specialty occupation. The AAO reaches this determination on the basis of its review of the entire record of proceeding, including the Form I-290B and the allied documents submitted with it on appeal.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The AAO recognizes the Department of Labor’s *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The 2008-2009 *Handbook’s* chapter “Market and Survey Researchers” indicates that employers of market research analysts do not normally require at least a bachelor’s degree, or its equivalent, in a specific specialty. This fact is clear in the following excerpt from the chapter’s “Training, Other Qualifications, and Advancement” section which indicates that a major or concentration in a specific specialty is not a normal aspect of the baccalaureate threshold for entry into the market-research-analyst occupation:

Training, Other Qualifications, and Advancement

A bachelor’s degree is usually sufficient for entry-level market and survey research positions. Higher degrees may be required for some positions, however. Continuing

¹ All references herein are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

education and keeping current with the latest methods of developing, conducting, and analyzing surveys and other data also is important for advancement.

Education and training. 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.

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. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

While in college, aspiring market and survey researchers should gain experience gathering and analyzing data, conducting interviews or surveys, and writing reports on their findings. This experience can prove invaluable later in obtaining a fulltime position in the field, because much of the initial work may center on these duties. 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.

As the *Handbook* indicates that entry into the market-research-analyst occupation may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, market research analyst positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) as read in the context of the statutory and regulatory definitions of specialty occupation. This information from the *Handbook* does not by itself preclude a particular market-research-analyst position from qualifying as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). However, it is incumbent on the petitioner to establish that its particular position is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. This the petitioner has failed to do.

The petitioner describes the proffered position exclusively in generalized statements of broad generic functions. These descriptions do not convey the substantive nature of whatever specialized knowledge the beneficiary would have to apply in the actual performance of those functions. For example, the petitioner does not: describe "the research methodology" that the beneficiary would establish; identify the analytical methods that the beneficiary would employ in analyzing "prices, sales, and methods of marketing and distribution"; or convey the substantive level of marketing research and analysis that would be required for the reports that the beneficiary would be expected to develop.

Under the relevant statutory and regulatory standards, outlined earlier, specialty occupation status is determined by what the evidence of record conveys about the level of knowledge in a specific specialty that the beneficiary must theoretically and practically apply in order to perform the particular job that is the subject of the H-1B petition under review. Therefore, to determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position's title. Nor will USCIS base a favorable determination on generalized descriptions of duties that do not relate actual performance that is indicative of the theoretical and practical application of at least bachelor's degree level of knowledge in a particular specialty. USCIS must focus on the actual employment of the alien. See generally *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position, an employer's standards that are not dictated by actual performance requirements of the position, or the extent to which the record's duty descriptions mirror those that the *Handbook* uses to generally describe an occupational category. Rather, the decisive issue is whether the evidence of record establishes that, as required by the Act, the particular position that is the subject of the petition actually requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty, and the attainment of a baccalaureate or higher degree in that specialty.

The AAO notes that the generic statements about the proffered position and its duties are sufficient to align the position with the broad occupational category of market research analysts as discussed in the *Handbook's* "Market and Survey Researchers" chapter. However, these generalized statements are not sufficiently specific to distinguish the proffered position as a unique, complex, or specialized market research analyst position.

First, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties. As the *Handbook* indicates that entry into the position may occur with a degree with coursework in a listed subjects, but without a specific course of study leading to a specific degree in the field, market research analyst positions do not categorically qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). As the record of proceeding contains no evidence establishing that the proffered position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. In short, the record of proceedings does not provide a basis for approving the petition under the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, the AAO finds that the petitioner failed to establish that the beneficiary is qualified to serve in a specialty occupation position. The Evaluation of Academics and Experience upon which the petitioner relies to establish the beneficiary's qualifications in accordance with the governing regulations at 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D) is materially defective for numerous reasons, of which the AAO will here identify three. First, the evaluator, Dr. Jelen of Morningside Evaluations and Consulting, is not competent to render an evaluation on the basis of experience, as the record does not establish him as "an official who has authority to

grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience," in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(I). Second, the evaluation does not provide a copy of academic transcripts related to the beneficiary's undergraduate or graduate studies in Pakistan. Third, the evaluation does not establish that the evaluator reviewed any such transcripts, although he endorses the value of the beneficiary's foreign undergraduate degree on the basis of "the number of years of coursework, the nature of the coursework, and the grades earned in the coursework." USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

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).

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.