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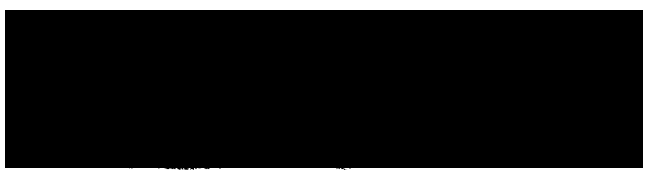


U.S. Citizenship
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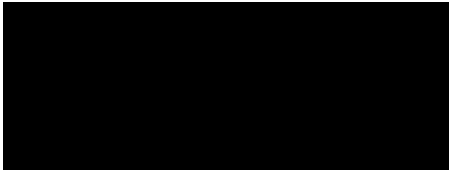


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date:

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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 corporation that supplies dental and oral care products to dental healthcare professionals. In order to employ the beneficiary as a dental market research analyst, the petitioner 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 that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation as set forth at 8 C.F.R. § 214.2 (h)(4)(iii)(A). The director determined, in part, that the evidence of record was insufficient to establish that the beneficiary would actually be employed as a market research analyst. On appeal, the petitioner contends that the director's decision was erroneous, and that the petition should have been granted.

The director's decision to deny the petition was correct. The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, as annotated by counsel, and the documents submitted with it.

The AAO agrees with counsel that the director erred in finding that the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* precludes firms such as the petitioner from requiring a market research analyst. The *Handbook* does not state, infer, or imply that market research analysts are hired only by the types of employers that the *Handbook* identifies as employing most of the workers in this occupation. Counsel also correctly asserted the apparent inconsistency between the director's findings that the proposed duties "reflect the duties of a Market Research Analyst" but that the proffered position is not a specialty occupation. However, on the basis of its own independent consideration of the entire record, the AAO finds that the petitioner has not satisfied any specialty occupation criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO is not bound by a decision of a service center or district director. *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).

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.

Consonant 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. (Italics added.)

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) has consistently interpreted 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, CIS 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 petitioner’s reply to the RFE provided the following paragraphs as a “[d]etailed description of the work [to be] done, percentage of time spent and level of responsibility from 1 to 10”:

Collects and maintains information on the requirements, organization, and budget for advertising on convention specials, dealers sales magazines and nationwide magazines. Track[s] and maintain[s] national/dealer advertisement schedule and production. Create[s] quarterly specials; make distribution to dealers and sales reps. 20% of total time is spent with this duty. Level of responsibility: 10.

Compiles data based on research techniques and on statistical compilations in the marketing division. Identif[ies] information needed for the organization. Performs analyses in the areas of product preferences, potentials, sales coverage, market size, penetration, marketing practices and trends, and prepares forecasts and recommendations. Gathers data on competitors and analyzes their prices, sales, and method of operation. Makes the company's price based on FOB costs and margins. Conducts on-site (in country) marketing analysis/assessments with foreign dentists and related industry companies, specifically in all Central and South American countries. 30% of total time is spent with this duty. Level of responsibility: 10.

Establish[es] strong, sustainable relationships with dental dealers, dental professionals, dental associations and universities in the United States and in foreign Spanish and Portuguese speaking countries. Responsible for dental sales and research [of] dental marketing trends in Central and South America. Prepares, gives presentations and suppl[ies] technical information to dental dealers and the dental community concerning the use and applications of dental products. 20% of total time is spent with this duty. Level of responsibility: 10.

Internet capability to use programs like Dreamweaver to design and give functionality to web pages [that] enables the company to communicate with all database customers. Perfect the web site and provide adequate maintenance. Write[s] and maintain[s] end user documentation (manual, catalogs and online help). Contribution to the full life cycle of projects: driving to insightful analyses and achieving results. 20% of total time is spent with this duty. Level of responsibility: 8.

Writes documentation for the FDA (Food and Drug Administration) for export authorizations. Preparation and support to all necessary documentation needed in the countries served by the company in Central and South America. 20% of total time is spent with this duty. Level of responsibility: 8.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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.

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 AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, and, accordingly, considered the evidence of record in the light of the 2004-2005 edition of the *Handbook*.¹ The AAO found that the evidence establishes that beneficiary would be employed in the marketing field, but not that he would have to apply the level of specialized knowledge that is normally required for the market research analyst occupation as presented in the *Handbook*.

The current, 2004-2005 edition of the *Handbook*, at page 173, describes the employment of market research analysts as follows:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need

After compiling the data, market research analysts evaluate them and 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 may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations

Because of the applicability of market research to many industries, market research analysts are employed in most industries

As a whole, the *Handbook's* information on market research analysts conveys that their work is characterized by the design and implementation of data-collection methodologies, data collection, and precise data analysis, at a level of expertise that most often requires a master's degree. The information provided by the petitioner does not establish that the beneficiary's involvement with marketing would be on such a specialized methodological and analytical level, or that it would require even a bachelor's degree in marketing or a related specialty.

The record provides no information about the specific research and analytic methodologies that the beneficiary would employ and the specialized knowledge that he would have to apply in their use. There are no specifics about any of the job functions upon which the petitioner relies for specialty occupation status, including how the beneficiary would: collect and maintain information for advertising; track and maintain advertisement schedules and production; create specials; make distributions; compile data from the marketing division; identify the petitioner's information needs; perform "analyses in the areas of product preferences, potentials, sales coverage, market size, penetration, marketing practices and trends"; gather and

¹ The AAO's comments are based upon the current, 2004-2005 edition of the *Handbook*.

analyze data on competitors; make petitioner's price based on FOB costs and margins; conduct "marketing analysis/assessments with foreign dentists and related industries"; "establish strong, sustainable relationships" with dental dealers, dental associations, and universities; and exercise responsibility for "dental sales and research [of] dental marketing trends in Central and South America." No information is provided from which the AAO can ascertain the level of specialized knowledge required for the beneficiary's presentations and providing of technical information, or why the beneficiary would require more knowledge for this function than the petitioner's outside sales representatives, for whom a bachelor's degree is not a requirement. Likewise, it is not self-evident that a specialized degree is required for the duties generally described with regard to the petitioner's Web site, or with regard to the preparation of documentation required by the FDA and Central and South American countries.

The generalized information about the proffered position is insufficient to identify the position not only with the market research analyst occupation, but also with any occupation for which the *Handbook* indicates that at least a bachelor's degree or its equivalent in a specific specialty is the normal minimum-entry requirement. No specific information is provided about the practical tasks or the knowledge that would have to be applied in any of the proffered position's functional areas, which are generally described in generic terms such as: collecting and maintaining information; compiling data based on research techniques and statistical compilations (upon whose nature the petitioner does not elaborate); analyses (unspecified) in several marketing areas; and marketing analysis/assessments (also unspecified) with foreign dentists and related industry companies. Without specifics about the content of and the methodologies employed in producing any of the beneficiary's work products, the AAO cannot determine whether the duties require the application of a body of highly specialized knowledge.

Because the evidence of record does not establish that the proffered position is one for which the normal minimum entry requirement is at least a bachelor's, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the 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 discussed above, to the limited extent that it is described in the record, the proffered position does not align with any occupation for which the *Handbook* indicates 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. Finally, the few job vacancy advertisements from other firms are not persuasive. They are too few to establish an industry-wide practice and there is no independent evidence to establish that they represent recruiting and hiring practices common to the petitioner's industry. Also, the information about the duties and responsibilities of both the advertised positions and the one proffered here is too general to support a meaningful comparison and a conclusion that the positions are parallel in their actual performance and specialty knowledge requirements.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with a at least a bachelor's degree in a specific specialty. The evidence of record does not demonstrate such complexity or uniqueness. The absence of specific information about those duties - highlighted in the discussion on 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) - precludes the AAO from recognizing the position as "so complex or unique that it can be performed only by an individual with a degree."

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty. The only relevant information is the petitioner's undocumented assertion that two prior marketing assistants held bachelor's degrees (one in marketing, and the other in a major not specified by the petitioner). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). The assertion is not sufficient to establish a creditable history of hiring only persons with a degree in a specific specialty, as the petitioner did not specify the major of one of the assistants.

Finally, the evidence about the proffered position, because it is presented in vague and generic terms, does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) 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 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.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The petition is denied.