

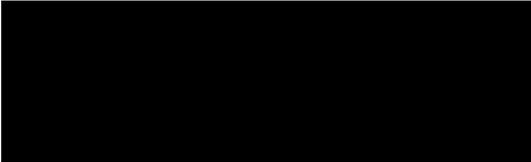
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**U.S. Citizenship
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FILE: WAC 03 052 54497 Office: CALIFORNIA SERVICE CENTER Date: **JAN 05 2005**

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

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

Robert P. Wiemann, Director
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 manufacturer and seller of precast stone materials. It seeks to employ the beneficiary as a strategic management analyst and to classify her 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 grounds that the proffered position is not a specialty occupation and, even if it were, the beneficiary is not qualified to perform the services thereof because she does not have the requisite master's degree. On appeal counsel argues that the minimum educational requirement for a strategic management analyst is only a bachelor's degree, which the applicant possesses, and that the duties of the subject position parallel those of a market research analyst, which likewise requires only a baccalaureate degree for entry into the occupation. Counsel asserts that the beneficiary would therefore be qualified for the position.

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 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.

As provided in 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's notice of decision; and (5) the petitioner's notice of appeal (Form I-290B), appeal brief and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner stated in its original petition that it seeks the beneficiary's services as a strategic management analyst. In response to the director's RFE the petitioner indicated that it needed the services of a strategic management analyst for its future expansion program. The duties of the proffered position were described as follows:

1. Gather and analyze information about the company's communication work flow, organizational and management structure, and financial data, and implement promotional strategies to ensure growth in the business.
2. Suggest methods and improvements to business and organizational systems to assist management in operating more efficiently and effectively.
3. Conduct studies and evaluate organizational work procedures to improve efficiency and profitability of the business.
4. Assist the management in decision making relating to business expansion, including determination of the right location and implementation of promotional strategies in opening new branches.
5. Review the feasibility of penetrating more market through on-line advertisement and advise top management of the requirements the company would have to meet for its implementation.

6. Conduct studies on the on-line consumer market, walk-in clients and the referral market, and advise top management on the income generating capability of the on-line untapped market.
7. Institute programs to motivate the company's employees to achieve optimum performance at work.
8. Develop solutions to the company's organizational problems and recommend the most effective and strategic method for their implementation through regular evaluation of the company's personnel.
9. Assess the prices and characteristics of various machines needed for the manufacturing and retail of stones, and determine which best meet the company's needs.

The petitioner asserted that a qualified candidate for the job must have a bachelor's degree in management, business administration, finance, marketing, or a related field. The beneficiary earned a bachelor's degree in banking and finance at the Polytechnic University of The Philippines in April 1984.

The director found that the duties of the proffered position reflected in part the duties of a marketing manager, which does not qualify as a specialty occupation because, according to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, a bachelor's degree in the specific specialty is not normally the minimum industry-wide requirement for entry into the position. The director was not persuaded that the beneficiary would be performing the services of a management analyst for the petitioner. According to the *Handbook* companies usually contract with a management consulting firm for the services of a management analyst, rather than hire an individual for an in-house position. Furthermore, even if the proffered position were that of a management analyst, and thus a specialty occupation, the director determined that the beneficiary is not qualified to perform the services of the position because she does not have a master's degree, which is normally required for entry into a management analyst position in the private sector.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered by CIS 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. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). 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, id.*, at 1165-66.

On appeal counsel refers to a decision issued by the AAO on June 1, 1994 in support of the petitioner's stance that the usual educational requirement for a strategic management analyst is a bachelor's degree, not a master's degree. The subject decision, however, does not hold what counsel asserts. Though the petitioner in that case alleged that the proffered position was a strategic management analyst, the AAO found that the duties of the position combined the duties of a management analyst and a market analyst.

After noting information from the *Handbook* that the usual requirement for a management analyst position is a master's degree in business administration and the usual requirement for a beginning market research position is a baccalaureate degree in economics or marketing, the AAO concluded that the proffered position was a specialty occupation within the meaning of the regulations. Thus, the AAO determined that management analysts and market researchers are both specialty occupations. But it did not hold that a baccalaureate degree is the usual educational requirement for a strategic management analyst position. Counsel overlooked the crucial fact in that case that the beneficiary's degree was a Master of Business Administration in International Business from a U.S. university. Therefore, he was qualified for the subject position whether it was classified as a management analyst or as a market researcher. See file EAC 94 020 53096, 13 Immig. Rptr. B2-34 (AAO, June 1, 1994).

Counsel refers in his appeal brief to several different resources used by the Department of Labor to describe and classify various jobs, and submits excerpts from each describing management analysts and market research analysts and their respective educational requirements. Counsel cites one in particular indicating that a baccalaureate degree may be sufficient to be hired as a management analyst. Regardless of the probative value of this resource, it does not help the petitioner in this appeal unless the proffered position is actually that of a management analyst. The director found that it was not, and the AAO agrees. The record does not reflect that the beneficiary would be performing the duties of a management analyst.

Counsel alleges on appeal that the duties of the proffered position parallel those of a market research analyst, and points out that the *Handbook* indicates entry-level positions in this occupation usually require only a baccalaureate degree. But the record does not establish that the proffered position should be classified as a market research analyst. In viewing the duties of the position, as described by the petitioner, the AAO notes that only three of the nine (specifically, duties 4-6) relate in any way to market research activities. Counsel has not addressed, or submitted any new evidence to refute, the director's finding that the proffered position most closely resembles that of a marketing manager. The AAO concurs with the director that the position, based on the job duties, most closely resembles that of a marketing manager. The duties of the position are determinative, not its title.

Turning to the regulatory criteria for specialty occupations, the *Handbook* indicates that a bachelor's degree in the specific specialty is not normally the minimum industry-wide requirement for entry into a marketing manager position. A wide range of educational backgrounds are suitable for entry into marketing manager jobs, the *Handbook* states, and many employers prefer a broad liberal arts background. The *Handbook* acknowledges, at page 24 of the 2004-05 edition, that "some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing," but that hardly constitutes a minimum industry-wide requirement of a baccalaureate degree in the specific specialty for entry into a marketing manager position. Accordingly, the proffered position in this case does not meet the first alternative criterion to qualify as a specialty occupation, set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The record contains no evidence regarding a degree requirement in parallel positions in the petitioner's industry, or from professional associations regarding an industry standard. Nor is there documentation in the record demonstrating that the proffered position is so complex or unique that it requires the services of an individual with a specialty degree. Thus, the proffered position does not meet the second alternative criterion to qualify as a specialty occupation, set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Since the proffered position is newly created, the petitioner has no hiring history and cannot show that it normally requires a specialty degree for the position. Accordingly, the position cannot meet the third alternative criterion to qualify as a specialty occupation, set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, as described in the record, the duties of the proffered position do not appear to be so specialized and complex that a knowledge level associated with a baccalaureate or higher degree in a specific specialty is needed to perform the job. Thus, the position does not meet the fourth alternative criterion to qualify as a specialty occupation, set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the petitioner has failed to establish that the proffered position meets any of the regulatory criteria to qualify as a specialty occupation. The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. *See* section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b), and 8 C.F.R. § 214.2(h)(1)(ii)(B). The petitioner has not established that the beneficiary will be performing services in a specialty occupation.

Since the proffered position is not a specialty occupation, the beneficiary's qualification to perform the services of the position is irrelevant. Accordingly, the AAO will not address this issue.

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.