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U.S. Citizenship
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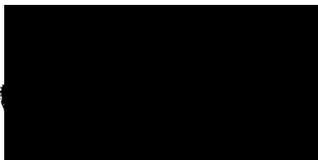
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FILE: WAC 04 014 54166 Office: CALIFORNIA SERVICE CENTER Date: **MAR 31 2005**

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 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 engaged in the business of providing in-home healthcare and seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, 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 because the petitioner has failed to establish that the position is a specialty occupation. On appeal, counsel submits a statement on the Form I-290B.

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.

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 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.

The petitioner is seeking the beneficiary's services as a market research analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would

perform duties that entail examining and analyzing data to forecast future marketing trends and to identify potential markets; will identify or have a list of hospitals, rehabilitation centers, social workers and physical therapists and collaborate with the administrators of these institutions and personalities for the proper introduction of the company's offered services; gathering data on competitors and analyze costs, sales and method of marketing; gathering data on competitors in terms of costing, sales and marketing strategies; discussing with hospitals and rehabilitation centers administrators, social workers and physical therapists possible options in costing and services offered by the company depending upon clients' health conditions; establishing research methodology and designing format for data gathering, such as surveys or questionnaires; devising methods and procedures for obtaining that data the company needs; designing telephone, personal or mail interview surveys to assess client preferences; researching how well the market receives the services that also includes planning and analyzing of gathered information to determine existing and prospective clients needs and demands; regular monitoring of clients problems or feedback about services offered by the company; providing management information needed to make decisions on promotion, marketing and pricing of services; assessing and evaluating the delivery of services and company's objectives and identify potential problems and opportunities and make recommendations for appropriate course of action; directly supervising caregivers working with the clients, ensuring caregiver and client relationship is harmonious and the company's objective of client satisfaction is obtained.; preparing weekly, monthly, semi-annual and annual reports on clients health conditions, problems and preferences; submitting proposals and findings to management for consideration.

The petitioner stated that a qualified market research analyst should earn degrees in marketing, statistics or some closely related discipline like economics or business administration.

On October 26, 2003, the director requested additional information about the proffered position, the beneficiary's qualifications and the petitioner. The director requested a more detailed job description and an explanation of why the work done requires the services of a person who has a college degree or its equivalent in the occupational field. The petitioner provided a more detailed job description and information about the petitioner. The petitioner provided an education evaluation which indicated that the beneficiary had received the equivalence of a bachelor's degree in statistics from an accredited university in the United States. The petitioner noted that the beneficiary would directly supervise approximately twenty-six caregivers and clients and make progress reports to the management. In his decision, the director noted that while the duties paraphrased the position of a market research analyst in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an analysis of the duties in light of the petitioner's business indicated that the position was a marketing manager.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers 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; 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 often

considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

In the instant petition, the petitioning entity stated that the duties of the proffered position parallel those of a market research analyst. According to the *Handbook*, 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. The *Handbook* reports that after compiling the data, market research analysts evaluate them and make recommendations to their client or employer based on their findings. They provide a company's management with information needed to make decisions on the promotion, design and distribution of the products or services.

Based on a review of the *Handbook* and the petitioner's job description, the AAO cannot conclude that the duties of the proposed position are parallel to those performed by a market research analyst. Although the petitioner has stated the beneficiary would gather data on competitors and analyze costs, sales and methods of marketing, the petitioner also stated that one of the duties of the position would be to discuss with clients possible options in costing and services offered by the petitioner depending upon the clients' health condition. Unlike the market research analyst duties noted in the *Handbook*, the petitioner stated that the position would have direct supervision of the caregivers working with the clients. Additionally, the petitioner stated one of the duties of the proffered position is to prepare reports on clients' health conditions, problems and preferences.

Based on the record of proceeding, the AAO agrees with the director that the proffered position is a marketing manager. According to the *Handbook*, marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, marketing managers determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets. According to the *Handbook*, marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied. This is similar to the proffered position in that the duties include providing management information needed to make decisions on promotion, marketing and pricing of services; implementing and supervising marketing strategies or promotions; planning and analyzing of gathered information to determine prospective clients needs and demands;

monitoring clients problems or feedback about services offered by the company; and gathering data on competitors in terms of costing, sales and marketing strategies.

With respect to the educational qualifications required of marketing managers, the *Handbook* states:

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.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the marketing manager position.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - neither the petitioner nor counsel addressed this issue.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a specific degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel states that the "job duties requires knowledge in market research and statistics. A two year or high school graduate can not perform such specialized skills." Without documentary evidence to support the claim, the assertions of counsel will not satisfy 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). To the extent they are described in the record, the duties of the position are not so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The duties parallel those in the *Handbook* for a marketing manager, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.