

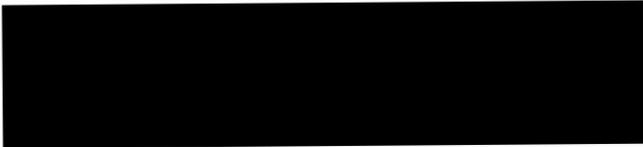
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FILE: WAC 04 175 53081 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

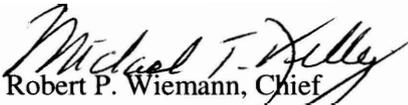
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 inquiry must be made to that office.

*for*   
Robert P. Wiemann, Chief  
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 construction company. It seeks to employ the beneficiary as a research and development analyst and to continue her classification 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 ground that the record failed to establish that the proffered position qualifies as 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.

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.

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

In its initial submission, including the Form I-129 and an accompanying letter, the petitioner described itself as a general building contractor for residential and commercial projects. The petitioner stated that its business

was established in 1997, had six employees, and earned a gross annual income of \$2 million in the previous fiscal year. The petitioner indicated that it was expanding its business and that it needed to employ the beneficiary as a part-time (30 hours/week) research and development analyst, in which position she had already been working for the company as an H-1B worker since February 2002, for an additional three years at an annual salary of \$27,206.40. The petitioner described the duties of the position as follows:

As a research and development analyst [the beneficiary] will prepare ongoing analysis of the company's target market. She will develop printed sales collateral information for the purpose of positioning the company with the competitive environment. She will present relevant information to the appropriate departments and management in order to find ways to maximize our profits and maintain that success.

Her responsibilities would include performing routine quantitative and narrative reporting, interpreting policies, drafting procedures, and making sound recommendations.

The beneficiary will be responsible for the analysis of data, report writing, planning and coordinating survey projects, responding to information and data requests, and developing standards.

She will prepare reports for effective analysis and ease of use. She will clean, transform, and structure data for analysis. This means testing and verifying the data for integrity, converting raw data information, and using data management techniques to prepare data and reports for analysis. She may also include data entry as required.

[The beneficiary] will organize and maintain research information (client data files, project documentation and reports), either electronically or in hard copy notebooks for future reference.

Her analysis should provide the basis for making practical and actionable recommendations that will help our company research our objectives. [The beneficiary] will also devote time in implementing systems that will be made available to [the] other research and development analyst at the conclusion of her period of stay.

She shall apply the basic principles of marketing involving transaction analysis, careful consideration of accounting for revenues, expenses, assets, and liabilities to maximize our profits and maintain our success.

The proffered position requires at least a baccalaureate level of education, the petitioner states, and the beneficiary qualifies by virtue of her bachelor of science in commerce, with a major in marketing, from the Philippine College of Commerce, awarded on April 22, 1970. According to the petitioner, the position falls within the broad occupational category of advertising, marketing, promotions, public relations, and sales managers, as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*.

In response to the RFE, the petitioner provided more details about its business, indicating that it is a general contractor that specializes in commercial, industrial and residential construction and remodeling, and outsources the work on individual projects to multiple subcontractors. The work of the research and

development analyst is vital for the company, the petitioner explained, to ensure that its services meet market demand. Since the beneficiary began working for the company in 2002 its annual revenues increased by 82%, the petitioner points out, and income tax returns in the record confirm that the petitioner's gross receipts increased from \$2,132,599 in 2002 to \$3,898,351 million in 2003. The petitioner also provided a more detailed description of the proffered position's duties, which reads as follows:

Market Analysis (65% of the beneficiary's time)

[The beneficiary] will continue to provide an ongoing analysis of the pricing strategy of our rates and services versus the rates and services of similar sized general contracting businesses. She will continue to develop printed sales collateral information for the purposes of positioning our company with a competitive environment with the continuous goal of maximizing profit without compromising the quality of our services.

In addition to monitoring similar organizations, [the beneficiary] will continue to examine target markets and industry trends that suggest the necessity of new services. Her responsibilities will continue to include analyzing the gathered data in order to provide the basis for making practical recommendations that will help our company meet policy objectives. Also, she will provide market research assistance on the economy, interest rates, employment growth, and demographic trends identifying market characteristics and consumer behavior that affects the potential survivability of our company. In order to do so, [the beneficiary] will not only perform online research, but also plan, organize, and conduct surveys and/or focus groups as a reliable way to judge the competitiveness of the current market place.

[The beneficiary] will resume applying the basic principle of marketing involving transaction analysis with careful consideration of internal factors such as accounting for revenue, expenses, assets, and liabilities to achieve a healthy profit margin and maintain our success.

Ultimately, [the beneficiary] will continue to conduct research using sophisticated search strategies and understand and interpret basic financial statements and metrics to continuously develop in-depth knowledge of developments in the real estate industry and their implications for our company.

Reporting and Management (35% of the beneficiary's time)

Following the analysis of the current industry [the beneficiary] will remain reporting and collaborating with [management]. She will continue to prepare routine quantitative and narrative reports for effective analysis and ease of use – cleaning, transforming, and structuring data for easy analysis for management reporting as well as for future use.

[The beneficiary] will outline specific strategic vulnerabilities so that we may be able to anticipate potential threats to our company. She will focus on both critical success factors as well as failure factors to identify patterns. By doing so, she will provide an understanding of what our company needs to change in order to cope with the contemporary challenges to growth, strategic change, and new service development. She will outline different types of

organizational structures and conditions under which changes in services are more likely to succeed.

[The beneficiary] will continue to build upon existing reports and organize information pertaining to client data files, project documentation, and other relevant information both in electronic form and hard copy form in order to provide back up files made available to future individuals holding this position at the conclusion of her stay.

Utilizing this information as well as sales data, we will collaborate to specify necessary changes in our services, interpreting company policies, and drafting procedures in order to construct an effective marketing plan. As a result, we will be able to develop an advertising strategy as well.

In his decision the director determined that the beneficiary would be performing “routine marketing type duties” and referred to information in the DOL *Handbook* indicating that a baccalaureate degree in a specific specialty is not a normal, industry-wide minimum requirement for entry into the occupation. Based on the evidence of record, the director found that the petitioner had failed to establish that the proffered position meets any of the alternative criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation.

On appeal counsel submits an evaluation of the proffered position and its required level of education, a series of internet job announcements for marketing managers, a list of the petitioner’s employees and a brief description of their job duties, an organizational chart, and some previously submitted materials which include letters from two other construction companies stating that they employ a research and development analyst and require at least a bachelor’s degree for the position. According to counsel the proffered position qualifies as a specialty occupation under all four alternative criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered 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. Sava*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). 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, Inc. v. Reno, id.*, at 1165-66.

Consistent with the petitioner’s description of the proffered position and the director’s decision, the AAO determines that the duties of the position accord with the *Handbook*’s description of a marketing manager. As part of a broad occupational category including advertising, promotions, public relations, and sales managers, marketing managers are described as follows in the *Handbook*, 2006-07 edition, at 27:

*Marketing managers* develop the firm’s marketing strategy in detail. [T]hey estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets – for example, business firms, wholesalers, retailers, government,

or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. . . . [T]hey monitor trends that indicate the need for new products and services and they oversee product development. Marketing managers work . . . to promote the firm's products and services and to attract potential users.

With respect to the educational requirements of the occupation, the *Handbook* states the following:

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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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. . . .

Most . . . marketing . . . management positions are filled by promoting experienced staff or related professional personnel . . . .

*Id.* at 28. As the *Handbook* clearly indicates, a baccalaureate or higher degree in a specific specialty is not the normal, industry-wide requirement for entry into a marketing manager position. Many employers give favorable consideration to a broad spectrum of degrees in hiring for such a position, and many positions are filled based on the applicant's relevant work experience. Thus, a marketing manager does not meet the first alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), because a baccalaureate degree in a specific specialty is not the normal minimum requirement to enter into such a position.

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel has submitted on appeal 16 internet job announcements for marketing managers or related positions, all of which require at least a baccalaureate degree. The advertisements do not show that any of the companies is in the same line of business as the petitioner, however, or that they are similar to the petitioner in their size and scale of operations. Furthermore, the majority of the advertisements do not state that the baccalaureate degree must be in any specific specialty. As for the two letters from other construction companies referenced by counsel on appeal, whose language is identical, both companies state that they employ a research and development analyst and require at least a bachelor's degree for the position. Neither letter indicates that the degree must be in any specific specialty, however, and neither letter provides any information about the duties of the position. Nor does either letter provide information about the company's scale of operations relative to the petitioner. Thus, neither the internet job advertisements nor the industry letters establish that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the evaluation of the proffered position submitted on appeal, it is authored by the academic program director of the Graduate School of Business at Florida Metropolitan University, [REDACTED] who states that he has a background in the fields of international business and technology. Mr. [REDACTED] declares that the position of research and development analyst is common in similarly sized companies and that the duties

of the position require a baccalaureate degree in business administration or a related subject. Mr. [REDACTED] does not identify any specific parallel positions and similarly sized companies on which he bases his finding, provides no information about the duties of those positions and the degrees possessed by the employees hired by those companies, and does not cite any studies, industry surveys, or other business data in support of the conclusion that the job duties could not be performed without a baccalaureate level of education. Going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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 DOL *Handbook*, which is a compilation of national data from industry surveys, literature, interviews, and other business data, establishes that a baccalaureate degree in a specific specialty is not required for entry into the occupation of marketing manager. The professor recites the job duties as described by the petitioner, which fail to distinguish the proffered position in any meaningful way from a marketing manager. Finally, the professor does not establish his expertise in regard to the hiring requirements of other small construction companies like the petitioner.

CIS may, in its discretion, use as advisory opinions statements from universities, professional organizations, or other sources submitted in evidence as expert testimony. When an opinion is not accord with other information or is in any way questionable, however, CIS is not required to accept or may give less weight to that evidence. *See Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988). The AAO determines that the opinion letter from Geoffrey Bligh is not persuasive evidence that a baccalaureate or higher degree in a specific specialty, or its equivalent, is a common requirement in the petitioner's industry for entry into parallel positions in similar organizations, as required for the position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).<sup>1</sup> Nor is it persuasive evidence that the proffered position satisfies any other criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the evidence of record demonstrate that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. The record does not show that the job is unique, or that it involves a level of complexity beyond that normally performed by a marketing manager, such that it can only be performed by an individual with a degree in a specific specialty. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the beneficiary is the only individual who has previously been hired for the proffered position. The AAO determines that this is not a sufficient hiring history to establish that the petitioner normally requires a baccalaureate or higher degree in a specific specialty or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the evidence of record does not show that the duties of the proffered position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree in a specific specialty. The documentation of record does not establish that the duties of the position

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<sup>1</sup> Even if the AAO regarded Mr. [REDACTED] evaluation as credible evidence of the academic requirements of the proffered position, the requirement of a degree with a generalized title such as business administration, without further evidence of a specific course of study closely related to the proffered position, does not establish that employers similar to the petitioner normally require a baccalaureate or higher degree in a specific specialty for the position. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558, 560 (Comm. 1988).

exceed the scope of an entry-level marketing manager, for whom baccalaureate level knowledge in a specific specialty is not normally required. Thus, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Thus, the position proffered by the petitioner does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The AAO also notes that an organizational chart submitted by counsel in support of the appeal identifies the position occupied by the beneficiary as “office secretary.” This designation is inconsistent with previously submitted organizational charts, which identified the beneficiary’s position as “research and development analyst,” and raises questions about what tasks the beneficiary actually performs. It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, doubt cast on any aspect of the petitioner’s evidence reflects on the reliability of the petitioner’s remaining evidence. *See id.*

Beyond the decision of the director, there is no evidence in the record, such as an evaluation of the beneficiary’s education in the Philippines by an academic credentials evaluation service, that the beneficiary’s degree from the Philippine College of Commerce – a bachelor of science in commerce, with a major in marketing – is equivalent to a bachelor’s degree in a specific specialty from a U.S. college or university, as required to establish that the beneficiary is qualified under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2) to perform services in a specialty occupation. For this reason as well the petition cannot be approved.

Notwithstanding the service center’s previous approval of H-1B status, the current petition to continue the beneficiary’s H-1B classification cannot be approved unless the record establishes current eligibility. CIS is not required to approve a petition when eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the petitioner’s record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See 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).

For all of the reasons discussed in this decision, the instant petition must be denied.

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.