



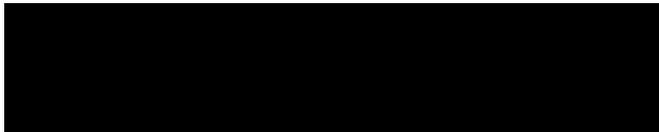
U.S. Citizenship
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Services

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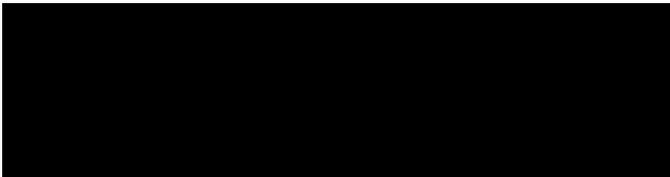
FILE: WAC 03 070 53901 Office: CALIFORNIA SERVICE CENTER Date: OCT 14 2004

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly warranted
invasion of personal privacy

DISCUSSION: The service center director denied the nonimmigrant visa petition. 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 company that operates a residential center and three individual group homes for persons with Alzheimer's disease and other forms of dementia. It 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 he determined that the proffered position is not a specialty occupation, and that the beneficiary is not qualified to perform the duties of the position. On appeal, counsel states that the position is a specialty occupation and the beneficiary is qualified to perform the duties of the position. Counsel submits further documentation.

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 record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the petitioner's letter of support; (3) the director's request for additional evidence, dated February 17, 2004; (4)

the petitioner's letter that responds to the director's request; (5) the director's denial letter; and (6) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing research analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's letter of support; and counsel's letter in response to the director's request for further evidence. According to the job description submitted by the petitioner, the beneficiary's duties would involve analyzing sales and financial data, implementing promotional strategies, and managing marketing campaigns. Other duties would involve analyzing demographical data to forecast future marketing trends, analyzing data gathered through questionnaires and opinion polls and then organizing the findings and preparing recommendations on the changes based on market demands. Finally, the petitioner stated the beneficiary would review and analyze proposals submitted by the various departments to determine the benefits derived and the results that would justify the expenditures. The petitioner indicated that it required a candidate with a baccalaureate degree in business administration with a major in marketing.

The director denied the petition and contrasted the proffered position to two job classifications examined in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, namely, marketing manager and market research analyst. In examining the position as a market research analyst, the director determined that the record was insufficient to classify the position as a market research analyst based on the type of industry in which the beneficiary would be employed. The director described the petitioner's business as being local in nature, and lacking a consumer base that was extensive or complex enough to require the services of a marketing and/or sales staff. With regard to the proffered position as a marketing manager position, the director determined that some of the duties outlined in the position were similar to those of marketing personnel; however, the *Handbook* indicated that a wide range of educational backgrounds was suitable for entry into marketing positions. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the position is a specialty occupation based on the job duties. Counsel asserts that even if the petitioner's business were confined to the local region, the petitioner would still need a market research analyst to provide it with marketing strategies and guidance on developing the petitioner's business. Counsel also states that even if the position were closer to that of a marketing manager, as the director suggested, the proffered position would still qualify as a specialty occupation. Counsel asserts that the petitioner is only required to meet one criterion of the four outlined in 8 C.F.R. § 214.2(h)(4)(iii), and that the director ignored evidence presented to establish other regulatory criteria. Counsel refers to both the *Handbook* and the Department of Labor's *O*NET* in examining the job classification of the proffered position.

Counsel further states that the complexity of the petitioner's business operation requires the services of a market research analyst. To support this assertion, counsel asserts that the petitioner previously stated that it offered a wide range of services to meet the physical and emotional needs of its residents as well as the family members of their residents, and that it is seeking to expand its client base and to compete with the steadily increasing number of similar service providers. Counsel also states that it is improper for the CIS to imply that the petitioner, as a smaller company, may not need a highly qualified person to handle its business needs. Counsel cites to *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989).

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 turns first to 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 *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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While the *Handbook* does not refer to the employment of part-time or full-time in-house market research analysts in residential assisted living centers, it is very clear that a relevant bachelor's degree is required for entry into entry-level market research positions. The *Handbook* also states that graduate degrees in marketing or related fields may be required for more senior positions.

Nevertheless, the question in the present proceeding is whether the proffered position is a marketing research analyst. Without more persuasive evidence, the petitioner has not established that the proffered position is either a market research analyst or a marketing manager. The job description provided by the petitioner lists generic duties in the area of marketing and research. The record is not clear as to how phrases used in the description, such as "working with various departments," "examining the demographic data to forecast future marketing trends," are applicable to the petitioner's residential facilities for Alzheimer's patients. According to the petitioner's website, the petitioner's business consists of one center for Alzheimer's patients and other forms of dementia with capacity for over 16 individuals, along with three other individual homes that each can house six Alzheimer's patients. See http://www.mountainviewcenters.com/fs_Locations.htm. (Available as of September 23, 2004.) With regard to its business infrastructure and staffing, the petitioner's personnel chart for the residential center, submitted in response to the director's request for further evidence, indicates the following staff structure: president, controller, a community resources person, the proffered position of marketing analyst, an administrator, a secretary, a cook, and six caregivers. A payroll document also provides the names of additional caregivers. As the director correctly pointed out, there is no sales or marketing departments for which a market research analyst would provide market analysis or that a marketing manager would direct in a marketing campaign or activities. In sum, the AAO concurs with the director's determination that the proffered position is neither a market research analyst nor a marketing manager. Counsel's reference to *Young China Daily* does not appear well founded, as the director's decision did not focus on the size of the company, but rather the nature of the petitioner's business operations.

The critical element in examining whether the proffered position is a specialty occupation is not the title of the position or 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 bachelor's degree in the

specific specialty as the minimum for entry into the occupation as required by the Act. Without more persuasive evidence, the petitioner has not established that the proffered position is a specialty occupation.

With regard to parallel positions in similar residential care facilities, the petitioner submitted five job vacancy announcements for market research analysts into the record. The companies advertising these positions range from three marketing and management consulting firms, such as NFO WorldGroup, identified as one of the world's leading market information groups, to Vertex, Inc, a tax administration software company. Although all the advertised positions are for market research analyst positions, none of these companies have business operations or activities similar to the petitioner. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner stated in its letter of support that the position was a new one. Therefore the petitioner cannot meet this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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. As previously stated, to the extent that they are depicted in the record, the duties of the position appear generic. The petitioner did not provide any specific information as to the specific marketing needs of the petitioner's residential care facilities within the regional business community. In addition, while the petitioner in its cover letter mentioned an international aspect to the proffered position, the record contains no details on any international aspects of the proffered position. Although the brochures submitted by the petitioner indicate a variety of available programs and services for its residents, the beneficiary would neither be operating or coordinating any of these services. They do not necessarily add to the complexity or uniqueness of the duties of the proffered position. The petitioner provided no further details as to any specialized or complex duties that the beneficiary would perform as a marketing research analyst. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the petitioner has not established that the proffered position is a specialty occupation.

The director also denied the petition because he determined that the beneficiary is not qualified to perform the duties of a specialty occupation. The director determined that, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the petitioner had not established that the evaluator of the beneficiary's training and work experience had the authority to grant college-level credit for training and experience at an accredited college or university that had a program for granting such credit. The director also found that the petitioner had not met the regulatory criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(3) because the evaluator had examined both the beneficiary's academic and work credentials.

On appeal, counsel states that [REDACTED] the evaluator who provided the educational equivalency report for the petitioner, has the authority to evaluate the beneficiary's work experience for the purposes of granting college credit, based on his impressive and lengthy teaching credentials, and his involvement in the field of marketing. Counsel states that the letterhead of the evaluator's document has the contact information

for the evaluator and that CIS may contact the Department of Business and Economics at Seattle University if it wishes to verify the evaluator's employment there.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an 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.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in marketing research. The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration

to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), in his request for further evidence, the director requested that the petitioner submit a letter from Seattle University to document that ██████████ associate professor and marketing program director, Albers School of Business, Seattle University, was authorized to grant university-level credit for the beneficiary's work experience and that Seattle University has such a program for granting credit based on an individual's training or work experience. The record is devoid of any such correspondence. Therefore, the petitioner provides insufficient evidence to establish this criterion.

With regard to 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), ██████████ used two methods to evaluate the equivalency of the beneficiary's studies and work to a U.S. university degree in marketing. First, he examined the level of skills and knowledge that academic marketing programs hope to give their graduates to prepare them for positions such as professional salespeople, entry-level marketing researchers, and entry-level positions in advertising or brand management. ██████████ then analyzed the combination of the beneficiary's education and specialized work experience that would be the equivalent of a typical four-year U.S. university program in marketing. ██████████ found that the beneficiary's post secondary studies were the equivalent of one year of university level studies. He then found that the beneficiary's twenty-four years of professional business and marketing experience, combined with the beneficiary's university studies, were the equivalent of a U.S. bachelor's degree in business administration with a major in marketing. However, Dr. ██████████ evaluation is based upon the beneficiary's education, training and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, while CIS would accept ██████████ assessment of the beneficiary's university studies; it does not give any weight to his evaluation of her work experiences. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record contains the beneficiary's transcript and diploma from Makati Polytechnic Community College, Manila, Philippines. Her transcript indicates that the beneficiary graduated from the Makati Community College, Manila, Philippines, in 1985, with a bachelor of science degree in secretarial administration. The record also has two letters from the beneficiary's former employers. [REDACTED] vice president, Empire Insurance Company, stated that the beneficiary had worked for his company from May 1976 to August 1991, and that the beneficiary had held the position of assistant manager in the marketing department. The letter writer also identified staff members with whom the beneficiary worked who possessed baccalaureate degrees in fields such as accounting, management, economics, law, and psychology. In a second letter, [REDACTED] chairman and chief executive officer, ICON Development Corporation, stated that the beneficiary had worked as a marketing analyst and manager from October 1997 to May 1999. [REDACTED] indicated that the beneficiary had worked with various staff members with university degrees.

These two letters, along with the evaluation document provided by [REDACTED] provide conflicting information with regard to positions held by the beneficiary during her work history. [REDACTED] stated that the beneficiary had started at the Empire Insurance as an accounting clerk, and had then become the head of her department. [REDACTED] simply stated that the beneficiary had worked for the company for fifteen years and had held the position of assistant manager of the marketing department. Although [REDACTED] stated that he based his educational equivalency document on the beneficiary's resume, in addition to other documents, the beneficiary's resume is not found in the record. Thus, the record is not clear as to what positions were held by the beneficiary, at what level, and for how long. In addition, neither Filipino employer indicates that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, which would be marketing or market research analysis. The letter from [REDACTED] indicates that the beneficiary worked with other

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

university graduates with a range of baccalaureate degrees, while the letter from [REDACTED] provides no specific information as to the academic credentials of her work colleagues.

Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge, which in the instant petition, is market research. Finally, there is insufficient evidence that the beneficiary has recognition of expertise. While Dr. [REDACTED] is acknowledged to be a recognized authority in the field of marketing, his comments do not address any significant contributions that the beneficiary has made in her field. Furthermore, the regulatory criterion states that two recognized authorities should provide evidence as to the beneficiary's contributions to her field of study.

With regard to the director's statement on discrepancies between the wages listed in the petition and the wages paid based on the petitioner's payroll records, counsel asserts that the beneficiary worked for the petitioner on a part time basis after her position with a previous petitioner ended. The payroll documents submitted by the petitioner reflect the initial part-time nature of the proffered position. The AAO finds this clarification by counsel to provide sufficient information to resolve this matter.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation, or that the beneficiary is qualified to perform the duties of the position. 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.