



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: WAC 04 020 50072 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2005**

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

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 operates residential care facilities and seeks to employ the beneficiary as a business development specialist. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant 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 proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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 director's request for additional evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) 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 part-time business development specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and counsel's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail the planning and implementation of the facility's sales and marketing functions; defining and developing new and/or expanded programs or services, unique pricing techniques, and development of strategic partnerships with large healthcare organization to further leverage its position in the independent retirement community market; (1) conferring with management to define how the company plans to pursue its expansion goals; working closely with management to get an accurate assessment of how the company is presently doing in terms of revenue, range of services offered, market share and client base; analyzing data (20% of time); (2) developing strategic business plans and policies that will allow the company to tap new territories such as rural and underserved areas; evaluating possibility of expanding the company's services in communities outside of its mainstream clientele; exploring the possibility of providing incidental medical services to residents which could be another source of income for the facility (30% of time); (3) analyzing business developments and consulting industry associations to monitor market trends in the assisted living industry; monitoring legislative trends, community events and other factors that may affect residential care facilities such as the petitioner (10%); (4) designing a market research plan; preparing a comprehensive market study of the industry and its closest competitors; analyzing survey data and developing aggressive marketing and pricing strategies to leverage its position against competitors (15% of time); (5) preparing new business proposals to hospitals and other health care facilities whose patients require assisted living facilities after they are discharged; entering into new partnerships or cooperative ventures (15% of time); (6) establishing monthly sales revenue goals; preparing forecasts and other reports required by management (10% of time). The petitioner did not indicate the degree requirement for the proffered position.

The director requested additional information about the proffered position and the beneficiary's qualifications. Additionally, the director requested information about the petitioner such as a copy of the facility license and copies of the petitioner's federal income tax returns for tax years 2000-2002. Counsel for the petitioner responded and indicated that the duties of the proffered position require a college degree or its equivalent in the occupational field such as business, business administration or other related field. The petitioner submitted individual U.S. tax returns Form 1040 for tax year 2002 with schedule C showing gross receipts or sales as \$400,143 and a loss of \$45,014. The petitioner submitted quarterly wage reports from March 2003 until January 2004 indicating a range between eight and ten employees.

The director determined that the proffered position was not a specialty occupation. The director found that the duties of the position as described by the petitioner are primarily those of a marketing manager. The director noted that the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) indicated that the positions of advertising, marketing, promotions, public relations, and sales managers are occupations that do not require a baccalaureate level of education in a specific specialty as a normal, industry wide minimum for entry into the occupation. The director stated that the evidence submitted is insufficient to establish that the position being offered requires the attainment of a baccalaureate or higher degree or its equivalent and is normally the minimum requirement for entry into the particular position; the degree requirement is common to the industry in parallel positions among similar organizations; or that the position is so complex or unique that it can be performed only by an individual with a degree; or that the employer normally requires a degree or its equivalent for the position; or that 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.

On appeal, counsel asserts "[n]ew and emerging positions such as Business Development Specialists/Analysts, which are legitimate specialized occupations in the real labor market, specifically the private sector, are not listed in the [*Handbook*]." Counsel contends that the petitioner has established that the degree requirement is common to the industry in parallel positions among similar organizations. Counsel also asserts that the petitioner has established that the specific duties of the proffered position are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate of higher degree.

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 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 *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.

Based on the record of proceeding, the AAO has determined that the proffered position is most similar to that of a marketing manager in the *Handbook*. 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 planning and implementation of the facility's sales and marketing functions; conferring with management to define how the company plans to pursue its expansion goals; working closely with management to get an accurate assessment of how the company is presently doing in terms of revenue, range of services offered, market share and client base.

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 - counsel submits internet job postings on appeal from a variety of healthcare companies.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. The evidence does not establish that the organizations are similar to the petitioner. For example, EmCare, Inc. indicates that is a \$450 million dollar industry leader. Keiro Senior Health Care is a non-profit organization and indicates that it has a dedicated staff of 600 employees. These organizations are not similar to the petitioner which indicated that it operates four residential facilities and provided a facility license for one facility indicating a total capacity of 6 clients. Consequently, the postings fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

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. Counsel contends that the duties are complex and states "the beneficiary will have to deal and negotiate with banks to arrange long or short-term financing and decide when the calculated risks are on the [p]etitioner's side." Counsel explains that the "concept of calculated risks is based on applications of proven business school theories and applications. . . ." 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 in a specific specialty. 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.

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.