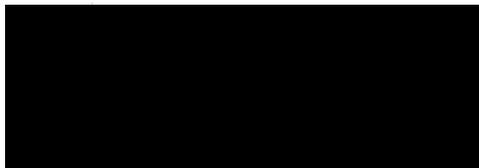


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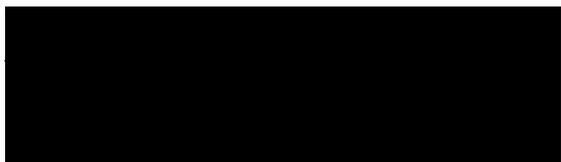
D2

FILE: WAC 04 027 53284 Office: CALIFORNIA SERVICE CENTER Date: **AUG 09 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 service center director 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 a real estate development and construction business that seeks to employ the beneficiary as a part-time market analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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.

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) the petitioner'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 market analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's October 23, 2003 letter in support of the

petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: exploring the viability of expanding the petitioner's construction activities to new markets including commercial construction and public project construction; providing the petitioner with detailed market studies, focusing on such areas as competitor analysis, demographic studies, and profitability; and preparing surveys, questionnaires, and other related data. The petitioner indicated that the beneficiary is a qualified candidate for the job because she possesses a bachelor's degree in psychology and many years of related work experience.

The director found that the proffered position was not a specialty occupation because the job is not a market analyst position; it is a marketing manager position. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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, in part, that the proffered position is that of a professional market analyst, and is not a marketing manager position. Counsel states further that the director disregarded the two expert opinions that were submitted as supporting documentation. According to counsel, even if the proffered position were that of a marketing manager, it would still warrant "specialty-occupation" designation.

The record contains the following documentation pertaining to the petitioner and the proffered position:

- Two opinions, dated January 19, 2004 and January 27, 2004, respectively, from professors of accredited U.S. universities, who affirm, in part, that, based on the proposed duties described in the petitioner's October 23, 2003 letter, the proffered position is that of a marketing analyst;
- Payroll documents for the quarters ending on March 31, 2003, June 30, 2003, and December 31, 2003, reflecting eight, nine, and 15 employees, respectively;
- Federal income tax return for the period from July 1, 2001 through June 30, 2002, reflecting a gross annual income of \$5,093.975, and no salaries and wages paid;
- Federal income tax return for the period from July 1, 2002 through June 30, 2003, reflecting a gross annual income of \$9,878,299, and no salaries and wages paid;
- Organizational chart reflecting the following 13 positions/employees: president/CEO; (the proffered market analyst position); executive assistant; manager - engineering/planning construction management; manager - operations & administration; manager - accounting & payroll; accountant; accounting clerk; budget analyst; project engineer; and three site supervisors;
- Evidence that the director has approved another market research analyst position;
- Internet job advertisements for market research analyst positions;
- Information from the DOL's *O*Net*; and

- Opinion from the president of a job placement agency, who states that a market research analyst requires a university 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 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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of a market research analyst, a position that, in business and industry, normally requires a master's degree in business administration, marketing, statistics, communications, or some closely related discipline. See the *Handbook*, 2004-2005 ed. at 174. In this case, the proffered position does not require a master's degree or a bachelor's degree in any of the fields mentioned above. The beneficiary holds a bachelor's degree in psychology conferred by a Filipino institution. Furthermore, although the petitioner's payroll documents for the quarters ending on March 31, 2003 and June 30, 2003 reflect eight and nine employees, respectively, the petitioner's federal income tax return for the period from July 1, 2002 through June 30, 2003 reflect no salaries and wages paid. The record, however, contains no explanation for this inconsistency. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In view of the foregoing, the exact nature of the petitioner's business and the proffered position are unclear.

The record contains two opinions from professors of accredited U.S. universities who affirm, in part, that, based on the proposed duties described in the petitioner's October 23, 2003 letter, the proffered position is that of a marketing analyst. The writers, however, provide no evidence in support of their affirmations. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for market research analysts. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The advertisements represent a variety of industries including manufacturing, information technology, medical,

games, hotel, and financial services. The petitioner's industry, however, is not represented. Thus, the advertisements have no relevance.

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, therefore, has 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. As the record indicates that the proffered position is a new position, the petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

Beyond the decision of the director, the AAO does not find that the beneficiary is qualified to perform the duties of a specialty occupation because the petitioner has not demonstrated that the beneficiary's baccalaureate degree in psychology and job experience qualify her for a market research analyst position. The academic opinions discussed above are noted. Both professors assert that the beneficiary's degree in psychology and employment experience qualify her for a market research analyst position. A review of the employment letter, dated December 11, 2003, from the senior manager for administration of the Filipino business, KPS Katipunan Parcel Services, Inc., does not indicate that the beneficiary's prior work experience included the theoretical and practical application of specialized knowledge required by the specialty. As described by the employer, the beneficiary's duties did not appear to involve the theoretical and practical application of market research analysis. The employer assigns duties to the beneficiary such as “[conducting] regular and periodic training and seminars among couriers[,] administration, marketing, and operation staff . . . towards productivity, efficiency, meeting corporate goals and individual/collective employee discipline” and “assisting the Operations and Administration departments in the evaluation of the performance of each employee based on clearly defined job description.” The petitioner has not demonstrated how this experience is related to a market research analyst position. Furthermore, even if the position did entail some duties related to market research analysis, the petitioner has not demonstrated that the primary nature of the beneficiary's position was related to market research analysis. Also, no specificity to the beneficiary's daily activities or her level of responsibility is provided. 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 this case is market research analysis. Furthermore, the employer does not indicate 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. It is additionally noted that the record contains a third opinion from the president of a job placement agency, who states, in part, that, in her experience, individuals

with baccalaureate degrees in fields including business administration, marketing, economics, management, commerce, finance, and accounting, are appropriate for market analyst positions; she, however, does not mention the field of psychology. For these additional reasons, the petition may not be approved.

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.