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FILE: WAC 03 239 53712 Office: CALIFORNIA SERVICE CENTER Date: **DEC 22 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 California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is an outpatient therapy center specializing in pediatric and adult therapy, with 60 employees. It seeks to employ the beneficiary as a market or marketing research analyst 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 the position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and previously submitted evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner seeks the beneficiary’s services as a marketing research analyst. Evidence of the beneficiary’s duties includes: the Form I-129 and the petitioner’s July 30, 2003 letter of support. At the time of filing, the petitioner indicated that the beneficiary would serve as its primary financial specialist, with 40 percent of her time spent on research analysis, another 40 percent devoted to budget development and implementation, and the remaining 20 percent spent on monitoring activities.

As described by the petitioner, the beneficiary’s research analysis role would require her to:

- Utilize computer based tools to gather information on competitors, prices, sales, and methods of marketing and distribution;
- Analyze market and health industry information using primary and secondary research sources, such as census statistics, association data, magazine articles, information obtained from the Internet and marketing studies;
- Create health industry reports with charts, graphs, and written summary analysis;
- Use appropriate and established research and statistical methodologies to derive conclusions and implications from data; and
- Present findings to management.

When assigned to budget development and implementation activities, the beneficiary would:

- Evaluate company finances in terms of the petitioner’s priorities and financial resources, and develop a budget that lowers costs and increases efficiency and profitability;
- Evaluate current and past budgets in light of economic and financial developments and trends;
- Examine budget estimates and proposals for completeness, accuracy, and conformance with established procedures, regulations and organizational objectives;
- Be responsible for fully implementing and maintaining a budgetary system which enables the petitioner to more effectively control expenditures necessary for expansion of its facilities, advertising/marketing, supplies and various project-based activities;

- Analyze financial statements and advise management on the financial implications of these statements;
- Compare monthly statements to budgeted projections and identify any variances, explaining how they differ from budgeted expenditures and highlighting any potential tax consequences, and recommending remedial procedures to rectify the discrepancies;
- Monitor the petitioner's adherence to the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified;
- Recommend, as appropriate, program cuts or reallocation of excess funds to avoid or alleviate deficits;
- Recommend approval or disapproval of requests for funds, based on the analysis of monthly statements, and determine what financial resources are required to implement various programs, allocating funds according to spending priorities; and
- Engage in long-range planning, considering future budget needs in light of expected growth, financial forecasts, and advances and trends in pediatric and adult rehabilitative therapy.

The petitioner also indicated that the beneficiary's monitoring responsibilities would require her to:

- Institute a system that verifies revenues, expenditures, assets, and liabilities; and
- Develop and establish computerized budget software to allow for easier and more accurate review of financial procedures, processes, and necessary documentation.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director concluded both that the duties of the proffered position were not those of a marketing research analyst and that the record failed to establish that the petitioner's business was of the type or complexity and scope to require a market research analyst. As discussed below, the AAO concurs in the director's finding that the proffered position is not that of a market research analyst. However, it finds the director to have misjudged the scope of the petitioner's business when he concluded that it did not have the consumer base to require the services of a marketing or sales staff. The AAO also disagrees with the director's statement that the petitioner's business is not sufficiently complex to require the services of a market research analyst. In that the *Handbook* indicates that the work of marketing research analysts is concerned with the potential sales of a product or service and that they provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services, market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner is a business engaged in providing pediatric and adult

therapy does not preclude it from engaging in the type of market research activities described by the *Handbook*. However, the petitioner's potential need to conduct market research does not establish the proffered position as a specialty occupation.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of market or marketing research analysts at pages 173-174 of the *Handbook*. It has taken particular note of the following section of that discussion:

[M]arket research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The AAO finds that it is market research analysts' work in the design and analysis of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicated that the beneficiary would analyze market and health industry information using primary and secondary research sources such as census statistics, association data, magazine articles, information obtained from the Internet and marketing studies, these market research responsibilities do not make the beneficiary a marketing research analyst. The issue is not whether the proffered position requires the beneficiary to do market research, which it does, but whether it is that of a marketing research analyst and requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through a master's degree in business administration, marketing, statistics, communications, or other related field. (*Handbook* at page 174). As the petitioner does not indicate that the proffered position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, nor to evaluate this type of research, the position does not reflect the work of a marketing research analyst.

Instead, like the director, the AAO finds the market research duties associated with the proffered position to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies. As discussed at pages 23-24 of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

...

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets 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. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users

The educational requirements imposed on individuals who seek employment as marketing managers are discussed at pages 24-25 of the *Handbook*:

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. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

. . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* indicates that employment as a marketing manager may be obtained based on experience, the AAO concludes that the performance of the proffered position's research duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field.

It now turns to the financial duties of the proffered position, which the petitioner's letter of support described as closely resembling those of a budget analyst. The AAO agrees. These financial duties, which include both the budget-related and monitoring activities described by the petitioner, do reflect the employment of budget analysts, an occupation described at pages 72-73 of the *Handbook*:

Deciding how to efficiently distribute limited financial resources is an important challenge in all organizations [Budget analysts] play the primary role in the development, analysis, and execution of budgets, which are used to allocate current resources and estimate future financial requirements

[I]n private sector firms, a budget analyst examines, analyzes, and seeks new ways to improve efficiency and increase profits

Budget analysts have many responsibilities in these organizations, but their primary task is providing advice and technical assistance in the preparation of annual budgets. At the beginning of each budget cycle, managers and department heads submit proposed operational and financial plans to budget analysts for review

Analysts examine the budget estimates or proposals for completeness, accuracy, and conformance with established procedures, regulations, and organizational objectives. Sometimes, they employ cost-benefit analysis to review financial requests, assess program tradeoffs, and explore alternative funding methods. They also examine past and current budgets and research economic and financial developments that affect the organization's spending

After this initial review process, budget analysts consolidate the individual departmental budgets into operating and capital budget summaries Budget analysts then help the chief operating officer, agency head, or other top managers analyze the proposed plan and devise possible alternatives if the projected results are unsatisfactory

Throughout the remainder of the year, analysts periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified In order to avoid or alleviate deficits, they may recommend program cuts or reallocation of excess funds Analysts also may be involved in long-range planning activities such as projecting future budget needs.

. . .

Budget analysts . . . develop guidelines and policies governing the formulation and maintenance of the budget, but they also measure organizational performance, assess the effects of various programs and policies on the budget

With regard to the educational requirements imposed by employers seeking to hire budget analysts, the *Handbook*, at page 73, states the following:

Private firms and government agencies generally require candidates for budget analyst positions to have at least a bachelor's degree, but many prefer or require a master's degree Sometimes, a degree in a field closely related to that of the employing industry or organization, such as engineering, may be preferred. Some firms prefer candidates with a degree in business because business courses emphasize quantitative and analytical skills

Because developing a budget involves manipulating numbers and requires strong analytical skills, courses in statistics or accounting are helpful, regardless of the prospective budget analyst's major field of study

Based on the above discussion, the AAO concludes that although employment as a budget analyst requires the minimum of a baccalaureate degree, it does not require that degree to be in a field of study directly related to budget analysis. As a result, the degree requirement imposed by the occupation of budget analyst does not establish the proffered position as a specialty occupation. When a job, like that of budget analyst, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Accordingly, the proffered position cannot be established as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the petitioner may be able to qualify the proffered position as a specialty occupation under another of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The record provides no evidence that would establish the proffered position as a position that is identifiable with an industry-wide educational standard, or one that is distinguishable, by its uniqueness or greater complexity, from a similar but non-degree-requiring position, as required by the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In reaching this decision, the AAO has considered the more than 20 Internet job advertisements from the healthcare industry, as well as Internet materials on careers in market research and finance, which counsel submits on appeal. However, none of the Internet announcements come from healthcare organizations that can be considered similar to the petitioner, an outpatient therapy clinic, as required to satisfy the second criterion. Further, as the record does not establish the proffered position as that of a market research analyst, the Internet discussions of this occupation and its degree requirements are not relevant to these proceedings. The career materials related to budget analysts do indicate a degree requirement for such employment. However, they, like the *Handbook*, do not identify a requirement for a degree in a specific specialty.

The record also fails to establish that the petitioner has a history of hiring degreed individuals for the proffered position, as required to establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). In its letter of support, the petitioner indicated that the proffered position was newly created, that the increasingly competitive environment in the healthcare industry had led to its decision to employ a marketing management analyst. On appeal, counsel contends that the petitioner has a history of hiring degreed professionals and notes the list of degreed employees submitted by the petitioner in response to the director's request for evidence. However, the record contains no independent documentation of the degrees held by these individuals and, therefore, does not establish the petitioner's normal hiring practices. Going on record without sufficient documentary evidence is not sufficient for the purposes of meeting the petitioner's 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)).

The fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In the instant case, the financial duties of the proffered position appear to satisfy the criterion's requirements. As described by the petitioner, the budget-related duties to be performed by the beneficiary, particularly those involving budget development and long-range financial planning, require a level of financial expertise usually gained through a baccalaureate degree in accounting, finance or a directly-related field. Accordingly, the petitioner has established the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) and the director's finding to the contrary is withdrawn.

The remaining issue before the AAO is whether the beneficiary is qualified to perform the duties of a specialty occupation. To make this determination, CIS looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (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.

The beneficiary does not possess a U.S. baccalaureate degree required by the specialty occupation. She does, however, hold a foreign degree that the petitioner contends is the equivalent of such a degree. To establish this equivalency, the petitioner, at the time of filing, submitted a copy of the beneficiary's 1985 degree in statistics from the University of The Philippines, as well as a transcript of the course work she completed toward that degree, and an evaluation of these materials prepared by International Credential Evaluators (ICE), Inc. in Norman, Oklahoma. The ICE evaluation finds the beneficiary's statistics degree from the University of The Philippines to be the equivalent of a statistics degree awarded by an accredited U.S. university.

Based on its review of the documentation provided by the petitioner, the AAO will accept the ICE evaluation of the beneficiary's academic background. The beneficiary holds the equivalent of a U.S. baccalaureate degree in statistics. Further, as the *Handbook* indicates that courses in statistics help prepare individuals for the manipulation of numbers and analysis required of budget analysts, the AAO finds the beneficiary's degree in statistics to be directly related to the budget duties of the proffered position. The petitioner has established the beneficiary's qualifications to perform the duties of a specialty occupation under the second requirement at 8 C.F.R. § 214.2(h)(4)(iii)(C).

For the reasons related in the preceding discussion, the petitioner has established both that the proffered position qualifies as a specialty occupation and that the beneficiary is qualified to perform its duties. Therefore, the director's denial of the petition is withdrawn.

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 sustained that burden.

ORDER: The appeal is sustained. The petition is approved.