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FILE: WAC 04 082 50719 Office: CALIFORNIA SERVICE CENTER Date: OCT 26 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:
[Redacted]

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 The denial will be withdrawn and the petition remanded for entry of a new decision.

The petitioner is a health care facility for the elderly. It seeks to employ the beneficiary as a marketing 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 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 regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1) states that the H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation.

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 marketing research analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail examining and analyzing statistical data to forecast future marketing trends and identify potential markets; gathering data on competitors and analyzing rates and methods of marketing in order to keep informed on trends; analyzing and researching market conditions in local and regional areas to determine sales of services; facilitating marketing strategies through customer/database segmentation and identification of targets; establishing a research methodology and a design format for gathering data from online surveys, opinions, and after-sales information; interpreting data about expenditures, prices, and future trends through daily statistical reports; adopting statistics and operations research technology to improve operations; compiling information by checking competitors' prices; preparing analysis reports on market conditions; analyzing income and financial data; implementing promotional strategies, and based on marketing reports determine which operational strategies to implement; and reviewing the feasibility of on-line advertisement. The petitioner requires a bachelor's degree or its equivalent with coursework in marketing, business administration, and economics.

The director stated that when determining whether a position qualifies as a specialty occupation, CIS does not rely solely on a job title; the specific duties of the position combined with the nature of the petitioner's business operations are factors that are considered. Each position must be evaluated based on the nature and complexity of the job duties; the beneficiary's degree in a related area does not guarantee the position is a specialty occupation, the director stated. According to the director, performing incidental duties that are those of a specialty occupation is insufficient to establish that a position is a specialty occupation. The director concluded that the proposed position is similar to a marketing manager as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reports that a bachelor's degree in a specific specialty is not required for this occupation. The director found no evidence supported the letter from Dr. Gary L. Karns of Seattle Pacific University, which asserted that a bachelor's degree is required for a marketing manager. According to the director, the proposed duties are generic and provide no detail as to the unique or complex nature of the proposed position. The director was not persuaded to classify the proposed position as a market research analyst as the petitioner's business did not extend beyond the local community; thus, it did not have an extensive or complex consumer base requiring the services of a marketing and/or sales staff. The director found that the petitioner did not have the organizational complexity to require the services of a market research analyst: it did not have a marketing division, department, team, staff or any marketing specialists, and did not produce advertising or sales campaigns through in-house account, creative, and media services departments. The director stated that the record does not support counsel's assertion that the proposed position is a specialty occupation; that the Board of Immigration Appeals indicates that the assertions of counsel do not constitute evidence; and that the

petitioner did not have a past practice of employing persons with a bachelor's degree in a specific specialty for the proposed position. The director discussed the relevance of *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) to the instant petition. According to the director, the record is insufficient to show that the proposed job could not be performed by an experienced person whose educational training falls short of a baccalaureate degree. The AAO notes that the director was mistaken by stating that there is no conflict as to whether the proposed position is full or part-time.

On appeal, counsel states that the evaluation by Professor Karns indicates that the proposed position is similar to a marketing analyst; that the *Handbook* and *Occupational Information Network (O*Net)* reveal that the proposed duties are similar to those of a marketing research specialist; and that the request for letters or affidavits from firms or individuals in the skilled nursing facility industry which state that "such businesses routinely employ and recruit only degree persons" exceeds CIS' regulatory authority.

Upon review of the record, the petitioner has established one of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is a specialty occupation.

To establish the first criterion at 8 C.F.R. §§ 214.2(h)(4)(iii)(A) the petitioner must establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. As described by the petitioner and as reflected in the record, the petitioner earns a gross annual income of over \$11 million and has over 200 employees. The AAO finds that the proposed job description resembles a market research analyst, which is a specialty occupation.

The petition may not be approved however, as the record does not indicate that the beneficiary is qualified to perform the services of the specialty occupation. As the director did not address the beneficiary's qualifications the director's decision will be withdrawn and the petition remanded so that the director may rule on the issue.

The AAO will now address whether the beneficiary qualifies for the proposed position, which is analogous to a market research analyst.

The *Handbook* indicates that employers in private industry require master's level education for the position of market research analysts. The record contains a copy of the beneficiary's transcripts and bachelor's degree (major in economics) from the Manual L. Quezon University in Manila. The record also contains a February 19, 2004 letter from Dr. Gary L. Karns with Seattle Pacific University indicating that the beneficiary's education and work experience are equivalent to a U.S. bachelor's and a master's degree in business administration with a specialization in marketing; and a January 2, 2001 letter from Dr. Thomas Trzyna, associate provost and dean of graduate studies with Seattle Pacific University, which states that Seattle Pacific University faculty have the authority to grant college level credit for training and experience. However, the AAO finds that a January 2, 2001 letter from Dr. Trzyna may not accurately reflect whether the university

presently authorizes university faculty to grant college level credit for training and experience.¹ To Furthermore, no evidence in the record independently corroborates the beneficiary's prior employment. Thus, the AAO finds that the evidence from Dr. Karns and Dr. Trzyna is not persuasive in establishing the beneficiary's qualifications for the proposed position.

Furthermore, the educational evaluation from the Foundation for International Services (FIS) does not establish the beneficiary's qualifications as it states that the beneficiary's education and work experience is equivalent to a master's degree in marketing. According to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D)(3), the beneficiary's credentials can be equated to a U.S. baccalaureate or higher degree based on an evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. Here, the FIS educational evaluation is not based solely on the beneficiary's foreign educational credentials; it is based on the beneficiary's education and work experience. Since the regulation requires that the evaluation be based on the beneficiary's foreign educational credentials, the evaluation from FIS carries little weight in establishing the beneficiary's qualifications.

The evidence discussed above is insufficient to establish the beneficiary's qualifications under the regulations. The petition will therefore be remanded so that the director may request any additional evidence deemed necessary to determine whether the beneficiary is qualified for the proposed position. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER : The director's decision of May 6, 2004 is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner is to be certified to the AAO for review.

¹ The Seattle Pacific University website does not indicate that the university has a program for granting credit for training or experience.