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U.S. Citizenship
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Services

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FILE: WAC 04 038 50478 Office: CALIFORNIA SERVICE CENTER Date: SEP 19 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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a senior retirement facility. It seeks to employ the beneficiary as a business operations analyst and to classify her 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 on the ground that the proffered position is not a specialty occupation.

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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a full-service living facility for seniors, established in 1995, with 239 apartment units and the 500-bed capacity. The petitioner indicates that it has 90 employees, gross annual income of \$5 million, and wants to hire the beneficiary as a part-time business operations analyst, working 20 hours/week. In the job description submitted with its response to the RFE the petitioner listed the duties of the position as follows:

■ **Participate in formulating and establishing company policies and operating procedures**

Review problems and procedures of each department – including human resources, marketing, and accounting – and recommend solutions.

Assist human resources director and staff in developing/improving employee handbooks/manuals.

Assist the marketing director in developing the residents' handbook.

■ **Assist department directors in enhancing job evaluation programs**

Recommend supplementary criteria needed for evaluating/assessing employee performances.

Research continuously for other effective methods of conducting employee job evaluation.

■ **Assist accounting department director in developing management control systems to aid in financial planning and cost analysis**

Enhance overall procedural system for conducting effective financial planning. Recommend appropriate computer software program to aid management in financial planning.

Analyze department budget to identify areas in which reductions can be made.

■ **Assist human resources director in developing wage and salary administration system**

Develop system of guidelines and procedures for processing employee payroll, including overtime and holiday pay.

Establish guidelines and policies governing employee leave benefits (*i.e.*, sick leave, vacation leave, maternity leave, etc.).

■ **Develop and implement methods and procedures for monitoring projects to inform management of their current status**

Conduct feasibility studies for special projects and ongoing programs to determine cost effectiveness.

Prepare records of expenditures and progress reports.

Perform cost-benefit analysis to minimize cost and maximize profits for each project.

■ **Plan and schedule workflow for each department and operation to standardize time and motion requirements of job duties**

At request of department directors, conduct time and motion study to improve effectiveness and efficiency of employees in their job performance.

According to the petitioner, the minimum educational requirement for the proffered position is a bachelor's degree in business, industrial engineering, operation science, or a related field. The record indicates that the beneficiary has a bachelor of science in industrial engineering from De La Salle University in Manila, the Philippines, granted on September 7, 1998.

The director determined that the petitioner's description of the job duties was too vague to substantiate the claim that a baccalaureate degree was the minimum educational requirement for an individual to be able to perform the job. In the director's view the petitioner failed to establish that the duties of the proffered position were those of a business operations analyst. Nor was there any evidence in the record of an industry standard among organizations similar to the petitioner requiring a baccalaureate degree for parallel positions. The director concluded that the proffered position did not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel reiterates the petitioner's contention that the proffered position is a specialty occupation. Counsel contends that the duties of the position are those of a business operations analyst, which qualifies as a specialty occupation because it requires at least a baccalaureate degree.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

The DOL *Handbook* does not include an occupational category bearing the title of the proffered position – *i.e.*, business operations analyst. In view of the petitioner's prior submission of the *Handbook's* entry for operations research analysts, however, it is clear that the petitioner views the proffered position as fitting within that occupational category. Operations research analysts are described as follows in the *Handbook*, 2004-05 edition, at 112:

The prevalence of operations research in the Nation's economy reflects the growing complexity of managing large organizations that require the effective use of money, materials, equipment, and people. Operations research analysts help determine better

ways to coordinate these elements by applying analytical methods from mathematics, science, and engineering. They solve problems in different ways and propose alternative solutions to management, which then chooses the course of action that best meets the organization's goals. In general, operations research analysts may be concerned with diverse issues such as top-level strategy, planning, forecasting, resource allocation, performance measurement, scheduling, the design of production facilities and systems, supply chain management, pricing, transportation and distribution, and the analysis of large databases.

. . . . Some firms centralize operations research in one department; others use operations research in each division. Operations research analysts may also work closely with senior management to identify and solve a variety of problems

Operations research analysts study such problems, breaking them into their components. Analysts then gather information about each of the components from a variety of sources

With the relevant information in hand, the analyst is ready to select the most appropriate analytical technique. Analysts can use any of several techniques, including simulation, linear and nonlinear programming, dynamic programming, queuing and other stochastic process models, Markov decision processes, econometric methods, data envelopment analysis, neural networks, expert systems, decision analysis, and the analytic hierarchy process. Nearly all of these techniques, however, involves the construction of a mathematical model that attempts to describe the system being studied

The *Handbook* goes on to describe the educational requirements of operations research analysts as follows:

Employers generally prefer applicants with at least a master's degree in operations research or a closely related field, such as computer science, engineering, business, mathematics, information systems, or management science, coupled with a bachelor's degree in computer science or a quantitative discipline, such as economics, mathematics, or statistics.

Id. at 113. An operations research analyst meets the statutory definition of a specialty occupation.

The duties of the proffered position do not reflect those of an operations research analyst, as described in the *Handbook*. There is no indication in the job description that the beneficiary would be constructing mathematical models or employing any of the analytical research techniques identified in the *Handbook*. Nor is the petitioner's business – a residential facility for seniors – the type of organization that typically employs an operations research analyst. As indicated in the *Handbook*, major employers of operations research analysts include telecommunications companies, aerospace manufacturers, computer systems design firms, financial institutions, insurance carriers, engineering and management services firms, and government agencies, as well as architectural, scientific, and technical consulting firms. *See id.* at 113.

In determining the nature of a particular position, and whether it qualifies as a specialty occupation, the duties that will actually be performed are crucial, not the title of the position. The petitioner must show that the performance demands of the position normally require a degree for entry into the position. The critical issue is not the employer's self-imposed standard, 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 a minimum for entry into the occupation. *Cf. Defensor v. Meissner*, 201 F.3d 384, 387-88 (5th Cir. 2000).

Based on the duties of the proffered position and the nature of the petitioner's business – a full-service living facility for seniors – the AAO determines that the proffered position is akin to that of an operations manager, as described in the DOL *Handbook*. Operations managers are a sub-category of the *Handbook's* broad occupational field called “top executives.” Their duties are described as follows:

. . . [O]perations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of . . . operations managers may overlap the duties of chief executive officers.

Handbook, id., at 65. The *Handbook* goes on to describe the educational background and experience of top executives, including operations managers, as follows:

The formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts Some top executives in the public sector have a background in public administration or liberal arts. Others might have a background related to their jobs Because many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many top managers have been promoted from within the organization. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers. However, many companies prefer that their top executives have specialized backgrounds and, therefore, hire individuals who have been managers in other organizations.

Id. at 66. While the foregoing excerpt indicates that some operations manager positions may require baccalaureate or higher degrees in a specific specialty, it is not the normal minimum requirement for entry into such a position. A wide variety of degrees and/or extensive experience in the occupational field can be a suitable background for entry into an operations manager position. Based on the foregoing information, the AAO concludes that the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, there is no evidence in the record that a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for it to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Thus, the petitioner cannot show that it normally requires a baccalaureate or higher degree in a specific specialty, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that 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 in a specific specialty. Though the petitioner asserts that its business needs an individual with baccalaureate level knowledge in a specialty field to perform the duties of the proffered position, there is no documentation in the record substantiating the petitioner's description of its business or the size and scale of its operations. The petitioner asserts that it is a 239-unit, 500-bed residential facility for seniors with 90 employees and gross annual income of \$5 million, but has submitted no evidence thereof. Simply going on record without supporting documentation does not satisfy the petitioner's burden of proof. *See 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)). While the size and scope of the business does not, in and of itself, determine a company's need for an operations manager, the nature of the petitioner's business, its income level, and the number and kind of workers it employs does have a direct and substantial bearing on the scope of the duties the beneficiary would perform in the proffered position and the type of knowledge required to perform them. The record in this petition does not establish that the duties of the proffered position or the knowledge required to perform them exceed those normally encountered in the occupational field of operations managers.

Based on the foregoing discussion, the AAO concludes that the proffered position does not qualify as a specialty occupation under any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.