

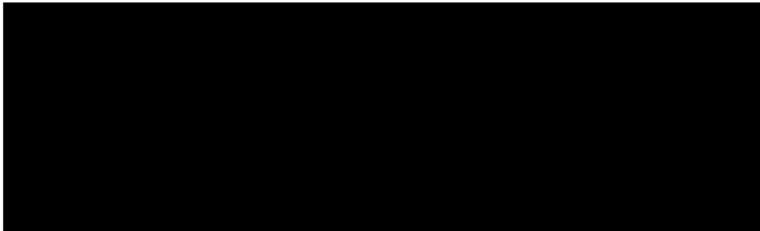
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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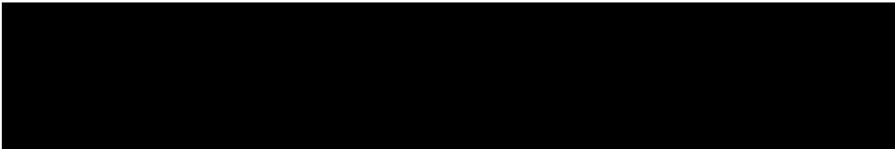
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FILE: WAC 05 085 51563 Office: CALIFORNIA SERVICE CENTER Date: JAN 08 2007

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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 dismissed. The petition will be denied.

The petitioner operates a 31-bed assisted living elderly care facility. It seeks to extend the employment of the beneficiary as a market researcher. Accordingly, the petitioner 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 record of proceeding before the AAO contains: (1) the February 2, 2005 Form I-129 and supporting documentation; (2) the director's April 19, 2005 notice of intent to deny; (3) counsel's May 17, 2005, response to the notice of intent to deny; (4) the director's July 13, 2005 denial letter; and (5) the Form I-290B and counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

On July 13, 2005, the director denied the petition concluding that the beneficiary is not clearly eligible for classification as an alien employed in a specialty occupation. On appeal, counsel for the petitioner submits a brief.

The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the statutory and regulatory requirements for a specialty occupation as follows:

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.

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.

On July 13, 2005, the director denied the petition determining: that the essential duties of the position were not of an ongoing nature and that the duties should have been completed; that the petitioner had not submitted evidence to support a claim of the ongoing necessity of the duties; that the workload was insufficient to support a full-time position; and that while the record contained evidence of four surveys created by the beneficiary, the record did not contain evidence of survey responses or analytical reports of findings. The director observed that the petitioner had provided little evidence of the beneficiary's three years of research work and that there was no reasonable expectation that the petitioner's business could utilize the beneficiary in a continuing capacity as a marketing analyst/researcher for the requested additional three years.

On appeal, counsel asserts the director's decision is in error because the director completely overlooked the detailed, specialized, and professional nature of the job duties of the position, focusing only on his perception that the petitioner did not need to continue the employment of a researcher. Counsel contends that the director should not supplant the petitioner's own determination of what its business needs to grow, expand, and remain competitive in its industry. While the AAO agrees that the director's reasoning is flawed, the AAO finds that the record does not establish that the petitioner will employ the beneficiary in a specialty occupation.

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 states that it is seeking to extend the beneficiary's services as a researcher for an additional three years. In a January 6, 2005 letter appended to the petition, the petitioner listed the beneficiary's essential duties and responsibilities as:

Continue to spearhead the research services of the facility. Part of such task[s] will include providing residents and customers with information on the history of the facility and the various services offered. In order to provide the above information, the Researcher must research and analyze data and information pertinent to the above topics. This would necessitate reading and gathering information from pertinent books, journals, periodicals[,] and such other documents as may be necessary.

Continue to research and evaluate list for identifying prospective market segments for its services; conduct feasibility studies; implement and apply appropriate strategies or programs to increase business volume. Establish and maintain relationships with different companies especially those with which the company conduct[s] business with to ensure that the best and most advantageous deals are secured for the facility.

Continue to establish design formats for gathering data including questionnaires and surveys and carefully analyze the market's potential and collect data on resident preferences as well as analyzing and gathering opinions regarding the facility's present services; prepare marketing strategies based on the analysis; prepare reports to refine and augment the facility's present approaches. Analyze the facility's present position in the industry and evaluate the current trend or direction thereof by studying market news and information.

Continue to gather data on competitor services and marketing strategies in an effort to uncover new marketing niches for the facility and establish factors to augment sales. Examine and analyze statistical data to forecast future market trends and conditions and determine how it affects the business. Develop long term marketing and business strategies on behalf of the facility and prepare forecasts and projection for emerging business cycles.

In a May 9, 2005 letter in response to a notice of intent to deny the petition, the petitioner listed the same duties and responsibilities as above, added a percentage of time spent on the duties, and added that the beneficiary would also spend 30 percent of her time on the following tasks:

Provide, source out, make available materials and resources on placement and community support services particularly for Dementia-Alzheimer's Disease clients. Manage publication of facility's quarterly newsletter, materials for marketing, and literature for general information and education. Build a resource center for information on eldercare with print and [I]nternet access within the facility for clients, staff and the community in general.

The petitioner also provided: a copy of a questionnaire on family support services and standards that requested the individuals surveyed to return their responses by August 24, 2004, [REDACTED], research coordinator signed the questionnaire; a May 12, 2005 study proposal on market ethnic profile; an undated affordability profile questionnaire; and an undated questionnaire on the subject of pets in residential facilities that the beneficiary signed as research coordinator. The record also contains: several copies of the petitioner's newsletters listing the editors as including four individuals including [REDACTED]; a report prepared by the beneficiary on dementia; a list regarding the old culture of dementia care that [REDACTED] prepared and a list regarding the new culture of dementia care that the beneficiary prepared; and a pamphlet identifying

community resources that the beneficiary prepared. The record does not indicate that the beneficiary and [REDACTED] are the same person. 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).

The director's denial of the petition based on his determination that the workload of the proffered position could not support a full-time position is withdrawn. The director's judgment that the petitioner's research should have been completed when the beneficiary's initial approval had expired is also withdrawn. However, the director correctly determined that the petitioner has not provided sufficient evidence to establish that the duties of the position meet the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To make its determination whether the employment described above qualifies as a specialty occupation, the AAO first turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely relies on the *Handbook* for the educational requirements of particular occupations. The 2006-2007 edition of the *Handbook* indicates the duties of market research analysts include:

Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need.

* * *

After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of 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 also may be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations.

* * *

Survey researchers design surveys in many different formats, depending upon the scope of their research and the method of collection. . . . Survey researchers may consult with economists, statisticians, market research analysts, or other data users in order to design surveys. They also may present survey results to clients.

The petitioner's general descriptions of the duties of the proffered position align most closely with the *Handbook's* discussion of market and survey researchers. A general description, however, is insufficient to establish that a proffered position is a specialty occupation. When establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, rather than providing a more detailed description of the beneficiary's duties, the petitioner provided documentary evidence of work the beneficiary had performed in the past and indicated the petitioner's expectation that the beneficiary would continue to perform similar duties. The limited scope of the submitted documents and their nature do not demonstrate

that the position requires a level of market research knowledge that may be obtained only through a baccalaureate or higher degree or equivalent as the normal minimum requirement for entry into the particular position. Moreover, the basic nature of the documents suggests that the individual producing or creating the documents is unschooled at a university level in market research. The documents submitted are insufficient to augment the petitioner's general description of the duties of the proffered position to a point that the AAO can conclude that the proffered position requires a baccalaureate degree in market research or its equivalent in a related field. The petitioner has not submitted sufficient evidence to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the petitioner has not submitted job announcements or other evidence that describe how the proffered position is parallel to other positions in similar organizations and that those organizations require individuals to obtain a degree in a specific discipline in order to perform the duties of the position. The petitioner has also failed to establish that the duties of the proffered position are so complex or unique that only an individual with a degree can perform them. The petitioner has not satisfied either prong of the criterion and, therefore, is unable to establish the proffered position as a specialty occupation on the basis of an industry-wide degree requirement or to distinguish it from similar, but non-degreed employment based on its unique nature or complexity. The petitioner has not submitted evidence sufficient to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not provided evidence that it normally requires a degree or its equivalent for the position. The petitioner in this matter provided a copy of its job announcement for the proffered position that indicated the minimum requirement for the position is a bachelor's degree or its equivalent. The petitioner did not indicate that a degree in a specific discipline is required. The AAO observes that when a job 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. *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. The petitioner has not provided evidence that it normally requires a degree in a specific discipline as a minimum requirement for entry into the position. The record does not demonstrate that the petitioner has satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the general description of the beneficiary's duties provided by the record does not substantiate that they are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. Without a meaningful list of duties related to its specific business operations, that demonstrates that the successful incumbent must have a baccalaureate degree or higher in a specific specialty, a petitioner may not establish that such duties are either specialized or complex. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the AAO notes that the *Handbook* reports the educational requirements for the occupation of market researcher as:

A bachelor's degree is the minimum educational requirement for many market and survey jobs. However, a master's degree may be required, especially for technical positions, and increases opportunities for advancement to more responsible positions.

* * *

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful.

As noted above, the petitioner provided a copy of its job announcement for the proffered position that did not indicate that the minimum requirement is a bachelor's degree or its equivalent in a specific discipline. The AAO observes that the petitioner provided a credential evaluation of the beneficiary's foreign education and that the evaluator noted that the beneficiary's major was in social welfare, including a specialization in community development. The evaluator concluded that the beneficiary's foreign education is equivalent to a bachelor's of science degree in social welfare. The beneficiary's transcript shows that she completed three introductory courses in statistics, economics, and general psychology. The petitioner has not explained how the three introductory courses in suggested subjects is sufficient to establish that the beneficiary's foreign training is the equivalent to a baccalaureate degree in a field that relates to the duties or occupation of a market researcher.

The AAO further observes that the beneficiary has continued to supplement her education in 2003 and 2004 by becoming a certified nursing assistant, attending a nursing training program, and attending five additional seminars or training sessions on issues relating to elder care. The only further evidence that the beneficiary has attained skills relating to the occupation of market researcher is the beneficiary's claimed training in two programs, *Market Research Basics* and *Marketing, Communication, and Presentation Skills* at a California community college. Thus, the AAO questions whether the beneficiary is qualified to perform the duties of a market or survey researcher. For this additional reason, the petition will not be approved.

The AAO acknowledges that the record contains evidence that the beneficiary was previously approved for H-1B status on the basis of a petition filed by the same petitioner. However, prior approvals do not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). This record of proceeding does not indicate whether the director reviewed the prior record and the rationale for the prior decision. However, if that record contained the same evidence as submitted with this petition, such as the same general description of the duties of the proffered position and the beneficiary's lack of educational credentials in a specific discipline relating directly to the proffered position, the CIS would have committed material error in approving the previously filed petition.

CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, 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 met that burden.

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