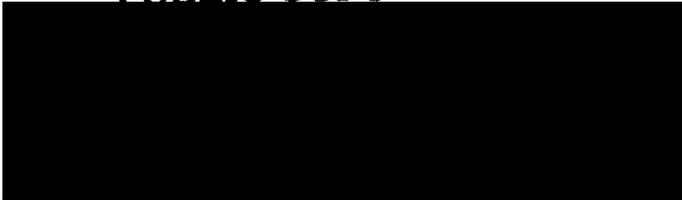




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



DA

FILE: WAC 04 002 50633 Office: CALIFORNIA SERVICE CENTER

Date: NOV 10 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 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 residential care facility. It seeks to employ the beneficiary as a public relations manager and to continue his classification 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 record failed to establish that the proffered position is 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 residential care facility for the elderly, established in 1992, with 35 employees and gross annual income in excess of \$1.4 million. The petitioner proposes to retain the beneficiary's services as a public relations manager – in which capacity he had been working for the company in H-1B status for two and a half years prior to the filing of the instant petition – for an additional three years. The duties of the position, and the percentage of the beneficiary's time spent on each duty, are described as follows:

- 20% Conducting and analyzing comparative marketing research on existing competition, evaluating probable new sources of clients, compiling research data, formulating marketing programs for the services offered, writing reports on findings for management.
- 20% Conducting advertising campaigns to reach targeted markets and keep up with competition; writing, creating and editing company brochures and advertising copies.
- 25% Devising a public relations program designed to create and maintain a favorable public image for the business and maintain a positive relationship with public, devising public surveys, understanding and keeping management aware of concerns of targeted consumers and organizations, advising management on the strategy and policy of such program.
- 35% Drafting and supervising the distribution of news releases, fact sheets, and photographs for publicity of business services, setting up speaking engagements and interviews, conferring with management to develop events, preparing materials for distribution and developing overall plans and policies for public relations program.

The beneficiary is qualified for the proffered position, the petitioner states, by virtue of his bachelor's degree in advertising and public relations from the Polytechnic University of the Philippines, granted on May 4, 1993, along with his work experience in the public relations field.

In his decision the director referred to the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*, determined that the proffered position was an amalgam of public relations manager and marketing manager as described in the *Handbook*, and cited information in the *Handbook* indicating that a baccalaureate level of study in a specific field is not the normal minimum requirement for entry into public relations and marketing manager positions. No documentation had been submitted to show that such a degree requirement was common to the industry in parallel positions among similar organizations, the director stated, and there was insufficient documentation to show that the proffered position was so complex or unique that it could only be performed by an individual with a specialty degree. The record did not indicate that the petitioner had previously hired any individual with a specialty degree for the position, the director stated, or that the duties of the proffered position were so specialized and complex that baccalaureate level knowledge was required to perform them. 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). The director also found that the petitioner did not have a valid Labor Condition Application (LCA) on file with the Department of Labor at the time the instant H-1B petition was filed, as required under the regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1).

On appeal counsel asserts that the proffered position requires an individual with a bachelor's degree. According to counsel the *Handbook* states that most employers require such a degree for a public relations manager. The proffered position is too complex for a marketing manager to operate effectively without a bachelor's degree, counsel contends, because the greater Los Angeles area in which the residential care facility is located is a large metropolitan area with diverse cultures and populations and multiple languages. With respect to the LCA issue, counsel argues that an inadvertent typographical error was made on the original LCA – identifying the proffered position as full-time instead of part-time – which was subsequently corrected and, therefore, should not prejudice the adjudication of the H-1B petition.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook, supra*, 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*, 764 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.

While the director determined that the proffered position incorporated elements of a public relations manager and a marketing manager, as described in the *Handbook*, the AAO views the proffered position – the only position in the petitioner's organization with responsibility for public relations issues, and therefore without any supervisory duties in that area – as primarily that of a public relations specialist, and secondarily that of a marketing manager. The occupation of public relations specialist is described in the *Handbook*, 2004-05 edition, at 270:

Public relations specialists – also referred to as communications specialists and media specialists, among other titles – serve as advocates for businesses, nonprofit associations, universities, hospitals, and other organizations, and build and maintain positive relationships with the public

Public relations specialists handle organizational functions such as media, community, consumer, industry, and governmental relations; political campaigns; interest-group representation; conflict mediation; or employee and investor relations. They help an organization and its public adapt mutually to each other To improve communication, public relations specialists establish and maintain cooperative relationships with representatives of community, consumer, employee, and public interest groups, and with representatives from print and broadcast journalism.

Informing the general public, interest groups, and stockholders of an organization's policies, activities, and accomplishments is an important part of a public relations specialist's job. The work also involves keeping management aware of public attitudes and the concerns of the many groups and organizations with which they must deal.

Media specialists draft press releases and contact people in the media who might print or broadcast their material Sometimes, the subject is an organization and its policies towards its employees or its role in the community. Often, the subject is a public issue, such as health, energy, or the environment.

Public affairs specialists also arrange and conduct programs to keep up contact between organization representatives and the public. For example, they set up speaking engagements and often prepare speeches for company officials. These media specialists represent employers at community projects; make film, slide, or other visual presentations . . . and plan conventions. In addition, they are responsible for preparing annual reports and writing proposals.

People who . . . direct public relations for a small organization may deal with all aspects of the job. They contact people, plan and research, and prepare materials for distribution. They also may handle advertising or sales promotion work to support marketing.

The *Handbook's* occupational description of a public relations specialist encompasses the last three duties of the proffered position, as listed by the petitioner, which comprise 80% of the beneficiary's time on the job. The *Handbook* describes the education and training required for the occupation as follows:

There are no defined standards for entry into a public relations career. A college degree combined with public relations experience, usually gained through an internship, is considered excellent preparation for public relations work; in fact, internships are becoming vital to obtaining employment Many entry-level public relations specialists have a college major in public relations, journalism, advertising, or communication. Some firms seek college graduates who have worked in electronic or print journalism. Other employers seek applicants with demonstrated communication skills and training or experience in a field related to the firm's business – information technology, health, science, engineering, sales, or finance, for example.

Handbook, id., at 271. According to the *Handbook*, therefore, while a college degree and public relations experience “is considered excellent preparation for public relations work,” there is no industry standard requiring a college degree in a specific specialty directly related to public relations. As indicated in the *Handbook*, a variety of educational backgrounds is acceptable for entry into the occupation.

As for marketing managers, that occupation is described in the *Handbook, id.*, at 23-24:

Marketing managers develop the firm's detailed marketing strategy. . . . [T]hey 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. . . . [T]hey monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising managers to promote the firm's products and services and to attract potential users.

The *Handbook's* occupational description of a marketing manager encompasses the first duty of the proffered position, as described by the petitioner, which comprises 20% of the beneficiary's time on the job. The *Handbook* describes the education and training required for the occupation as follows:

A wide range of educational backgrounds is suitable for entry into . . . marketing . . . managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable.

For marketing . . . management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing

Id. at 24. According to the *Handbook*, therefore, while some employers may prefer a marketing manager to have a baccalaureate or higher degree in business administration with an emphasis on marketing, there is no industry standard requiring a college degree in a specific specialty directly related to marketing. As indicated in the *Handbook*, a wide range of educational backgrounds is acceptable for entry into the occupation, especially when combined with relevant work experience.

Thus, neither a public relations specialist nor a marketing manager is an occupation for which a baccalaureate or higher degree in a specific specialty is the normal minimum requirement for entry into the occupation. The proffered position, therefore, as a combination of those two occupations, does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

With regard to the second alternative criterion of a specialty occupation, there is no documentation in the record showing that a degree requirement in a specific specialty is common to the petitioner's industry in parallel positions among similar organizations. Thus, the proffered position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that the proffered position is so complex or unique that a degree in a specific specialty is required to perform the job. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Since the proffered position is newly created the petitioner has no history of requiring a specialty degree or its equivalent. Accordingly, the position does not qualify as a specialty occupation under the third alternative criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not show that the duties of the proffered position are so specialized and complex that they require baccalaureate level knowledge in a specific specialty, as required to meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Though counsel asserts that the ethnic, sociological, and linguistic conditions of greater Los Angeles make the duties of the position specialized and complex, the evidence of record does not show that specialized knowledge associated with a baccalaureate or higher degree in a specific specialty is required to perform them. Mere assertions by counsel, unsupported by documentary evidence, will not satisfy the petitioner's burden of proof. See *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record does not show that the duties of the proffered position exceed the

scope of a typical public relations manager and/or marketing manager, for whom baccalaureate level knowledge in a specific specialty is not ordinarily required.

Counsel asserts that the instant petition should be approved because the previous H-1B petition filed on behalf of the beneficiary for the same position was approved, and he will continue to work for the petitioner in the same capacity. The AAO does not agree. CIS is not required to approve a petition when eligibility has not been demonstrated – as in the instant case – merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the petitioner's record of proceeding. *See* 8 C.F.R. § 103.2 (b)(16)(ii). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Only published precedent decisions are binding on all CIS employees in the administration of the Act. *See* 8 C.F.R. § 103.3(c). The AAO determines that the documentation of record does not establish that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

For the reasons discussed above, the record does not establish that the proffered position meets any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. Thus, 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 director also denied the petition on the ground that the petitioner did not have a valid Labor Condition Application (Form ETA 9035) for the proffered position at the time its Petition for a Nonimmigrant Worker (Form I-129) was filed to continue the beneficiary's previously approved employment without change and to extend his stay in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) specifies that:

Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

The record shows that the petitioner filed the instant Form I-129 petition on October 1, 2003, requesting H-1B classification for the beneficiary in the market research analyst position for a three-year employment period from October 1, 2003 to October 1, 2006. The petition was accompanied by a Labor Condition Application (LCA) for the proffered position certified by the Department of Labor (DOL), but it indicated that the position was full-time, rather than part-time as indicated on the petition. The director advised the petitioner of this discrepancy in the RFE, and requested the submission of a new LCA with the correct information. The petitioner responded with a certified LCA indicating that the proffered position was part-time, in conformance with the petition, but bearing an approval date of August 16, 2004 and a validity period of August 16, 2004 through October 1, 2006. Thus, DOL's certification of the LCA postdated the filing of the H-1B petition by nearly a year. Since the petitioner did not obtain the requisite

labor certification “[b]efore filing a petition for H-1B classification,” as specified in 8 C.F.R. § 214.2(h)(4)(i)(B)(1), the director correctly denied the petition. CIS regulations require a petitioner to establish eligibility for the benefit at the time the petition is filed. *See* 8 C.F.R. § 103.2 (b)(12).

Though counsel asserts on appeal that the error on the original LCA was an inadvertent typographical mistake, the fact remains that the information in the LCA was inconsistent with that in the petition and therefore did not constitute a valid LCA. The subsequent filing of a new LCA did not remedy the problem because it was certified by DOL after the H-1B petition was filed. The only proper remedy for the petitioner would have been to file a new petition along with its newly-certified LCA. The regulation at 8 C.F.R. § 214.2(h)(15)(ii)(B)(1) specifies that a request for extension of stay in H-1B visa status “must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.” The petitioner did not have a valid LCA for the requested employment period of October 1, 2003 to October 1, 2006 at the time the instant petition was filed, in October 2003, requesting an extension of stay for the beneficiary.

Thus, the petitioner has failed to establish the beneficiary’s eligibility for classification as a nonimmigrant worker employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act.

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.