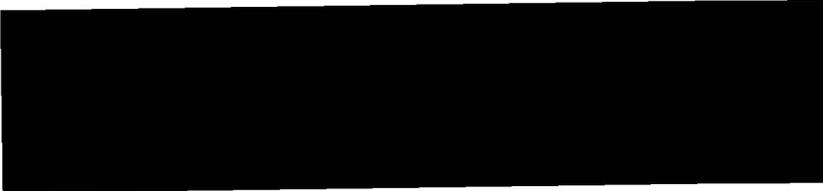




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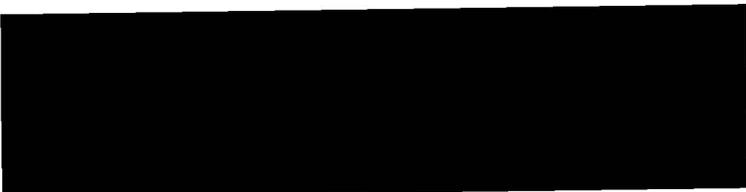


FILE: EAC 04 160 52643 Office: VERMONT SERVICE CENTER Date: **JUL 14 2006**

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, Chief
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 appeal will be dismissed. The petition will be denied.

The petitioner consists of three entities: one provides “professional services” to clients in China engaged in tourism, trade, and cultural exchange; the second promotes education exchange programs between the United States and Asian countries; and the third provides “consulting business to China,” organizes trade shows, provides business training for Chinese delegates to its trade shows, and organizes business travel for the delegates. The petitioner has three employees and, according to counsel, had a gross annual income of \$812,000 in 2004. It proposes to continue its employment of the beneficiary as an administrative project manager. The petitioner, therefore, endeavors to extend the beneficiary’s 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 basis of her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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:

[A]n 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 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 proposed position.

The petitioner’s April 20, 2004 letter of support set forth the duties of the proposed position as follows:

As Assistant Project Manager for [the petitioner], [the beneficiary] will be responsible for: (1) soliciting, training[,] and organizing Chinese executives [and] preparing them for participation in trade show[s], (2) maintaining continuous contact with Chinese delegates and arranging the travel itinerary for their visit to the United States, which includes[,] but is not limited to, organizing the international travel plans and hotel accommodations as well as scheduling corporate functions/conferences, (3) preparing all the necessary documentation, in Chinese [and] English, for the Chinese delegates to visit the United States, and (4) utilizing information system skills to maintain the [petitioner’s] official [w]ebsite and databases.

The petitioner noted that the position required the ability to speak, read, and write Chinese, as well as the ability to use Chinese software. In noting the beneficiary’s unique qualifications for its proposed position, the petitioner pointed to his experience as a front desk assistant at a hotel in Switzerland, as well as his experience as an assistant manager at a Swiss restaurant.

In her September 21, 2004 request for additional evidence, the director noted the duties of the proposed position, concluding that “[i]t is not clear that such a position would require a baccalaureate degree in order to fulfill the job requirements.” As such, she requested additional documentation to demonstrate that the position qualifies for classification as a specialty occupation.

In its October 13, 2004 response to the director’s request for evidence, the petitioner stated that the duties of the proposed position fell into four main areas: (1) research and analysis; (2) project management; (3) computer operations; and (4) international travel and communication.

The first category, research and analysis, would consist of the following duties: assisting in conducting research; collecting and analyzing data; monitoring economic trends and developing forecasts; and utilizing the understanding of economic relationships to coordinate business ventures with potential investors from China and the United States.

The second category, project management, would consist of the following duties: developing potential investment project plans; setting goals and deadlines; implementing organizational procedures for staff; coordinating and organizing foreign delegations during initial appraisals of business opportunities, including conferring with partners, staff, and clients, and preparing presentations for them; preparing foreign delegations for trade shows and business solicitation; working with marketing groups on specified

projects; assisting in marketing management decision-making; assisting in the planning and development of policies and procedures for carrying the operations of investment opportunities; organizing office operations and procedures to ensure efficiency; utilizing computer knowledge and information technology skills to prepare initial presentation of specified investment opportunities; planning and developing methods and procedures for implementing cultural exchange programs; and managing the development of projects and activities.

The third category, computer operations, would consist of the following duties: directing and coordinating computer operations; determining ways to organize and store data; utilizing information system skills to maintain databases and systems, and testing and coordinating changes to them; utilizing the database management system to prepare organizational budgets for various projects; forecasting operating costs and ongoing expenses; preparing financial reports; conferring with supervisors to discuss progress of work, resolve problems, and ensure that specified projects are met; supervising the technical aspects of each project, including the drafting of equipment specifications or developing programs for specified applications; and taking responsibility for all technical aspects of the petitioner's website, including performance issues.

The fourth category, international travel and communication, would consist of the following duties: organizing and training foreign delegates from China to participate in trade shows and prepare all investment proposal documents for investors in Chinese and English; utilizing foreign language skills to arrange complete travel itineraries for American and Chinese delegations; and preparing documentation for the delegations to visit the United States and China.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. The director also noted that, since the record did not contain a breakdown of the percentages of time to be devoted to each job duty, CIS was unable to determine how much time the beneficiary would spend performing H-1B-caliber duties versus time spent performing duties that normally would not require degree. Based upon its review of the entire record of proceeding, the AAO finds that the director's decision was correct.

On appeal, counsel contends that the director erred in denying the petition. Counsel contends that since the petitioner's job description consisted of "more than 50 typed-lines," the petitioner had demonstrated that its proposed position qualifies for classification as a specialty occupation.

The AAO begins its analysis by observing that the proposed position and its duties are described in exclusively generic terms that identify job functions in the abstract, without relation to what they involve in actual practice in the petitioner's travel business. These descriptions do not substantiate the level of knowledge that the beneficiary would employ in the job. They do not identify concrete substantive matters that the beneficiary would address in this particular petitioner's business operations. They do not identify particular theoretical and practical applications of baccalaureate-level specialized knowledge that the beneficiary's work would require. As a consequence of this abstract characterization of the job without relation to actual performance, there is no reasonable basis for the AAO to determine that the proposed position or the duties comprising it are unique or particularly complex or specialized.

In stating that the director erred in denying the petition on the basis of the petitioner's failure to submit a breakdown of the percentages of time to be devoted to each job duty, counsel misunderstands the basis of the denial. The petition was not denied simply on the basis of the failure to provide such evidence. Had the

petitioner provided detailed evidence regarding the actual duties that the beneficiary would perform, and not provided a list of vague and abstract functions, such a breakdown would have been unnecessary.

Moreover, the AAO notes that the duties of the position changed between the initial filing and the petitioner's response to the director's request for evidence. As noted previously, the duties of the position when the petition was initially filed included consisted of preparing Chinese executives for participation in trade shows, arranging itineraries for these executives' trips to the United States, preparing the documentation for these trips, and maintaining the petitioner's website and database. The petitioner made special note of the beneficiary's experience in the tourism industry, pointing to his experience as a front desk assistant at a hotel in Switzerland, as well as his experience as an assistant manager at a Swiss restaurant.

The duties of the position as initially proposed were similar to those of travel clerks and travel counselors, as those positions are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), a resource the AAO routinely consults for its information about the duties and educational requirements of particular occupations. According to the *Handbook*, a bachelor's degree is not normally required for such positions.

In its response to the director's request for additional information regarding the duties of the proposed position, the petitioner provided the information referenced by counsel in his appellate brief. While making travel arrangements for Chinese business travelers was the primary purpose of the position in the initial submission, the duties appeared much broader in the petitioner's response. In the new description of the duties of the position, the job functions relating to travel arrangements comprised only one of four categories.

As noted by the director in his denial, the petitioner offered no breakdown of the percentages of time to be devoted to each task. Counsel also correctly notes that the director never asked for such evidence. However, the petitioner submitted new information that altered the focus of its proposed position. As such, the burden was on the petitioner to account for how this new information fit into its description of the proposed duties.

Such information was not submitted on appeal, either. Without this information, the must AAO assume that, since the portion of the position relating to making travel arrangements for Chinese business travelers now comprises one category of four, that such duties would constitute one-fourth of the duties of the position.

Accordingly, the AAO finds the petitioner to have materially altered the duties of its proposed position, as the second iteration of the duties of the position materially expanded, rather than clarified, the duties of the position.

The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic

duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

As noted previously, the duties of the proposed position, as stated in the initial filing, resembled those of travel clerks and travel counselors, as those positions are described in the *Handbook*. According to the *Handbook*, a high school diploma is the most common educational requirement for this type of position. Accordingly, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the seven job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate degree or higher as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

There is no information in the record to demonstrate that any of these companies are similar in size or scope of operations to the petitioner. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

SafeNet is an internet security company, OnAssignment Clinical Research is a pharmaceutical company, Grant Thornton is an accounting and management consulting firm, Momentum Marketing is a marketing firm, and DigitalNet is a government contractor. Of the two unnamed companies advertising their vacancies through Kaye/Bassman, one owns, develops, and constructs high-end multi-family properties and the other is a general contractor. Counsel has submitted no evidence to demonstrate that the petitioner is similar in any way to any of these companies.

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position qualifies as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is similar to the travel clerk and travel counselor positions described in the *Handbook*, which normally does not require a degree in a specific field.

Accordingly, the petitioner has not established that its proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner's ability to meet this criterion, the AAO normally reviews the petitioner's

past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

Counsel contends that the proposed position qualifies under this criterion for two reasons. First, counsel contends that the position qualifies under this position because it employs two other individuals with bachelor's degrees. According to counsel, the petitioner employs a program specialist with a bachelor's degree in education/teaching, and an assistant operations manager with a bachelor's degree in international trade.

However, the petitioner is not petitioning for a program specialist or an assistant operations manager, so it cannot use its degree requirement for those positions as evidence that it normally requires a degree for the position proposed here.

Counsel also asserts that the proposed position qualifies under this criterion because the beneficiary himself possesses a degree. However, the petitioner cannot use the beneficiary's degree as evidence that it normally requires a degree for this position. Moreover, one previous hire does not establish a history of requiring individuals with a degree.

As such, the proposed position does not qualify as a specialty occupation under the third criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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.

A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than that normally expected of travel clerks and travel counselors. Therefore, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. There is no information in the record to support a finding that the market research analyst duties are more specialized and complex than the travel clerk and travel counselor positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. Therefore, the evidence does not establish that the market research duties of the proposed position qualify it as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO notes that the beneficiary is currently in H-1B status. However, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute material and gross error on the part of the director. The AAO 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a

service center. *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).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will not disturb the director's denial of the petition.

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 sustained that burden.

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