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U.S. Citizenship
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APR 26 2007

FILE: EAC 05 224 54307 Office: VERMONT SERVICE CENTER Date:

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 The director's decision will be withdrawn and the matter remanded to the service center for entry of a new decision.

The petitioner is a wedding consultant and planner that seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 finding 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.¹ 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 Counsel's submission also includes evidence from the initial H-1B filing, including: (1) previous counsel's June 21, 2002 response to the director's request for additional evidence; (2) the director's July 3, 2002 denial of the petition; (3) previous counsel's August 5, 2002 Form I-290B and accompanying appellate brief; (4) the AAO's November 12, 2003 dismissal of the appeal; (5) previous counsel's motion to reconsider and the petitioner's December 11, 2003 letter accompanying the motion to reconsider; and (6) the AAO's April 25, 2005 remand of the petition to the director, in which the AAO found the proposed position a specialty occupation, but remanded the decision for a determination on the beneficiary's qualifications to perform the duties of the position. The petition was approved on June 13, 2005; its period of validity was December 3, 2001 through December 3, 2004.

- (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.

According to the petitioner’s letter of support, the duties of the proposed position would include researching market conditions and economic trends in local and regional areas to determine potential sales of services; establishing research methodologies and formats for data gathering, such as surveys, opinion polls, and questionnaires; examining and analyzing statistical data to forecast marketing trends; setting projected revenue goals for one-, five-, and ten-year periods; gathering data on prices, sales figures, and methods of marketing and distribution; collecting data on customer preferences and buying habits; and preparing reports and graphic illustrations of his findings for recommendation to management.

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.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In her denial, the director, relying on the 2004-2005 edition of the *Handbook*, found that many of the duties of the proposed position reflect the employment of a market research analyst, but concluded that the record failed to establish that the petitioner’s business was of the type or complexity to require a market research analyst. The director found further that the petitioner was not conducting sufficient business to warrant approval of the extension. The director also took note of the fact that, although the initial petition had been approved in June 2005, the beneficiary had not been working for the petitioner.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity or operate the type of business that would require a marketing research analyst. The *Handbook* indicates that the work of market research analysts is applicable to many industries and that they are employed throughout the economy. In that market researchers are concerned with the

potential sales of products or services and provide a company's management with the information needed to make decisions on the promotion, distribution, design and pricing of products or services, the petitioner's need for marketing research may not be discounted based on a lack of organizational complexity or its type of business. The fact that the petitioner is a wedding consultant and planner does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of identifying business opportunities.

The director also finds the director to have erred in assuming that, because the beneficiary was not working for the petitioner at the time the petition was filed, the petitioner was not conducting sufficient business to warrant approval of the extension. As noted by counsel on appeal, although the previous petition was approved in June 2005, the petition's period of validity was December 3, 2001 through December 3, 2004. The beneficiary would have been working without authorization had he been working without an H-1B approval.

The AAO, therefore, withdraws the director's decision.

In reaching its conclusion regarding the nature of the proposed position, the AAO has reviewed the discussion of market or marketing research analysts at page 175 of the 2006-2007 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

[M]arket research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon 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 may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The *Handbook* states the following with regard to the educational qualifications necessary for entry into this field:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs.

The AAO finds that it is market research analysts' work in the design and analysis of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. The AAO concludes that the record of proceeding establishes that such functions are in fact encompassed within the duties proposed by the petitioner.

The proposed position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a showing that the nature of the specific duties of the proposed position is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The AAO finds that, in this particular record of proceeding, such a demonstration has been made.

However, the petition may not be approved at this time, as the record does not demonstrate that the beneficiary qualifies to perform the duties of the specialty occupation, or that the petitioner has submitted a valid certified labor condition application (LCA).

In order to demonstrate that the petitioner qualifies to perform the duties of a specialty occupation, the petitioner submitted copies of letters attesting to the beneficiary's work experience, a copy of the beneficiary's resume, and an evaluation of work experience prepared by the Global Education Group, Inc. (Global), dated October 22, 2001.²

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In making its determination as to whether the beneficiary qualifies to perform the duties of a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(C), as described above, which requires a demonstration that the beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The first criterion requires a showing that the beneficiary earned a baccalaureate or higher degree from a United States institution of higher education. The beneficiary does not possess a baccalaureate or higher degree, so he does not qualify under this criterion.

Nor does the beneficiary qualify under the second criterion, which requires a demonstration that the beneficiary's foreign degree has been determined to be equivalent to a United States baccalaureate or

² The record also contains a position evaluation, dated November 4, 2005, which was prepared by American Evaluation and Translation Services, Inc. This evaluation, however, did not evaluate the beneficiary's credentials.

higher degree required by the specialty occupation from an accredited college or university. While the Global evaluator did determine that the beneficiary's work experience is equivalent to a bachelor's degree in business administration, this evaluation does not satisfy 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). In order to qualify under this criterion, the evaluation must be based solely upon the beneficiary's foreign degree; a credentials evaluation service may evaluate educational credentials only. 8 C.F.R. § 14.2(h)(4)(iii)(D)(3).

The record does not demonstrate, nor has the petitioner contended, that the beneficiary holds an unrestricted state license, registration or certification to practice the specialty occupation, so he does not qualify under the third criterion, either.

The fourth criterion, set forth at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), requires a showing that the beneficiary's education, specialized training, and/or progressively responsible experience is equivalent to the completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary also has recognition of that expertise in the specialty through progressively responsible positions directly related to the specialty.

Thus, it is the fourth criterion under which the petitioner must classify the beneficiary's combination of education and work experience. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating a beneficiary's credentials to a United States baccalaureate or higher degree is determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The beneficiary does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as there has been no demonstration that the Global evaluator possesses the authority to grant college-level credit for training and/or experience in business administration at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience in business administration or a related field.

Although the evaluator stated that he possesses such authority, no evidence was submitted to document his assertion. 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(2), which requires that the beneficiary submit the results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI).

Nor does the beneficiary satisfy 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). As was the case under 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), the beneficiary is unqualified under this criterion because the Global evaluation was based upon experience. In order to qualify under this criterion, the Global evaluation would have to have been based upon foreign educational credentials alone.

No evidence has been submitted to establish, nor has counsel contended, that the beneficiary satisfies 8 C.F.R. § 214.2(h)(4)(iii)(D)(4), which requires that the beneficiary submit evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty.

The AAO next turns to the fifth criterion. When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation³;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country;
or

³ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The evidence of record traces the beneficiary's work history from 1981 through 1988 and 1993 through 2001, for a total 15 years. As provided by regulation, the formula utilized by CIS is three years of specialized training and/or work experience for each year of college-level training that the alien lacks. A baccalaureate degree from a United States institution of higher education would require four years of study, so the beneficiary must demonstrate twelve years of qualifying experience.

As the beneficiary possesses fifteen years of work experience, the AAO's next line of inquiry is to determine whether at least twelve years of the beneficiary's work experience included the theoretical and practical application of specialized knowledge required by the specialty, whether it was gained while working with peers, supervisors, or subordinates who held a bachelor's degree or its equivalent in business administration, and whether the beneficiary achieved recognition of expertise in the field as evidenced by at least one of the five types of documentation delineated in sections (i), (ii), (iii), (iv), or (v) of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

As noted previously, the petitioner submitted letters regarding the beneficiary's previous work experiences. However, these letters do not establish that the beneficiary's work experience included the theoretical and practical application of specialty knowledge required by market research analysts, that it was gained while working with peers, supervisors, or subordinates who held degrees required by the specialty, or that he achieved recognition of expertise in the field of market research as described at section (v) of 8 C.F.R. § 214.2(h)(iv)(D)(5).

Nor does the Global evaluation establish eligibility under this criterion. First, as noted previously, there has been no demonstration that the beneficiary's work experience included the theoretical and practical application of specialty knowledge required by market research analysts, and that it was gained while working with peers, supervisors, or subordinates who held degrees in the specialty. Although the evaluator asserted that he qualifies as a "recognized authority" due to his status as a consultant to Global and on his academic and professional background, the AAO disagrees.

As noted in footnote 3, "recognized authority" means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Moreover, a recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. See 8 C.F.R. § 214.2(h)(4)(ii). The Globe evaluation does not meet these requirements.

Moreover, even if the AAO were to accept the contention that the Globe evaluator meets the definition of a "recognized authority," the criterion would still remain unfulfilled. In order to establish recognition of a beneficiary's expertise under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i) specifically states that such recognition must come from at least *two* recognized authorities in the field.

Accordingly, the beneficiary does not qualify under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1)(2)(3)(4), or (5), and therefore by extension does not qualify under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Therefore, the petitioner has not demonstrated that the beneficiary qualifies to perform the duties of a specialty occupation. However, the director did not address this issue in her denial.

The AAO also finds that the petitioner's failure to obtain a certified LCA prior to filing the petition precludes its approval. Although the petitioner submitted a certified LCA at the time it filed the petition, it later "amended" the petition through the filing of an LCA certified for part-time employment.

The regulation at 8 C.F.R. § 214.2(h)(4)(i)(B)(1) stipulates the following:

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 instant petition was received at the service center on August 11, 2005. However, the petitioner has submitted a new certified LCA, which was certified on November 9, 2005, a date subsequent to filing of the petition.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(1) states that, when filing an H-1B petition, the petitioner must submit with the petition "[a] certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary." Thus, in order for a petition to be approvable, the LCA must have been certified before the H-1B petition was filed. The submission of an LCA certified subsequent to the filing of the petition satisfies neither 8 C.F.R. § 214.2(h)(4)(i)(B)(1) nor 8 C.F.R. § 214.2(h)(4)(iii)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

The failure to procure it before filing the H-1B petition precludes the petition's approval, and there is no provision in the regulations for discretionary relief from the LCA requirements. However, the director did not address this issue in her denial.

Accordingly, while the record does establish that the proposed position qualifies for classification as a specialty occupation, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the specialty occupation or that the record contains an LCA for the position certified prior to the filing date of the petition. However, the director did not address either issue. Thus, the director's decision will be withdrawn and the petition remanded to the director for entry of a new decision. The director may afford the petitioner reasonable time to provide evidence pertinent to the issue of whether the beneficiary is qualified to perform the duties of the specialty occupation and to establish that it obtained an LCA for the position certified prior to the filing date of the petition. The director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's December 1, 2005 decision 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.