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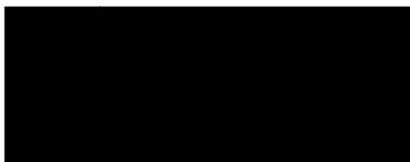
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20 Mass Ave., N.W., Rm. 3000  
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U.S. Citizenship  
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Services

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FILE: WAC 06 216 52897 Office: CALIFORNIA SERVICE CENTER Date: JAN 04 2008

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.

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 is a convenience store and gas station that seeks to employ the beneficiary as a market research analyst. The petitioner, therefore, 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 director denied the petition because the proffered position is not 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 evidence (RFE); (3) responses from counsel and the petitioner to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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) consistently 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.

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 (5<sup>th</sup> 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 seeks the beneficiary's services as a market research analyst. Evidence of the beneficiary's duties includes: the petitioner's June 16, 2006 letter in support of the petition and the petitioner's undated response to the director's RFE. As stated by the petitioner, the proposed duties are as follows:

1. Research market conditions to determine potential sales of products;
2. Examine and analyze statistical data to forecast future marketing trends;
3. Gather data on competitors and analyze prices, sales and methods of marketing and distribution;
4. Overall responsibility over contracts regarding the sale and distribution of products; examine performance requirements and delivery schedules to ensure completeness and accuracy;
5. Prepare bids, process specific requirements, test and prepare progress reports;
6. Plan and direct sales programs to promote new markets, improve competitive position in area and provide fast and efficient customer service;

7. Advise production departments of contract rights and obligations;
8. Direct activities of personnel in sales, record keeping, receiving and shipping operations to implement fulfillment of contracts; and
9. Liaise between customers and subcontractors to resolve issues regarding contracts.

The director found that the proposed duties do not require a bachelor's degree. The director also found that the petitioner willfully misrepresented the nature of its business, as the petitioner's federal tax returns list it as a retail trade, gas, and convenience store, as opposed to a commercial investments/wholesale distribution business as described on the petition. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is that of a market research analyst, and that the petitioner, which is a convenience store and gas station, was not trying to mislead or misrepresent itself, that it intends to expand its operations in the wholesale arena. Counsel also states that the proposed duties, which entail both marketing and human resources management, are specialized, complex, and professional, thus requiring a bachelor's degree. Counsel also cites a court decision in support of the petition stating that whether a position is professional is unrelated to the company's size, salary, or prior company history of maintaining the position.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). **Therefore, the proffered position is not a specialty occupation.**

The AAO turns first to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While a review of the Market and Survey Researchers category in the 2006-07 *Handbook* finds that market research analysts are employed throughout the economy, the AAO does not concur with counsel that the proffered position is a specialty occupation, as the *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for a market research analyst position. While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare

a person to perform the duties of a market research analyst. The petitioner did not provide a description of duties in a market research analyst-related field that corresponds to the *Handbook* and that would require a master's degree. Moreover, as discussed in the director's decision, the record contains inconsistencies. Specifically, the petitioner is a gas station and convenience store, as opposed to a commercial investments/wholesale distribution business as described on the petition. Counsel's assertion on appeal that the petitioner intends to expand its operations in the wholesale arena, is noted. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). 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). 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In addition, although the petitioner claims on the petition a projected gross annual income of \$3.5 million and 10 to 15 projected employees for 2006/2007, the record contains no evidence, such as federal income tax returns and quarterly wage reports, that the petitioner generates this level of income or has this number of employees. It is noted that the petitioner's 2005 federal income tax return reflects \$1,140,004 in gross receipts or sales, \$18,000 paid in compensation of officers, and \$26,000 paid in salaries and wages. 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)). In view of the foregoing, the record does not establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the generally described position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The record does not include any evidence regarding parallel positions in the petitioner's industry. Nor does the record include evidence from firms, individuals, or professional associations that establishes an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In this case, the petitioner has not provided evidence that the proffered position incorporates duties that require complex market research analysis. The petitioner has not identified any unique duties that are specifically pertinent to the petitioner's business operations that would require knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. Counsel does not address this issue on appeal. The evidence of record does not establish this criterion.

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

The petitioner has not demonstrated that the duties are 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. The AAO here incorporates its discussion about the conflicting evidence about the petitioning entity. Due to the inconsistencies discussed herein, the petitioner has not demonstrated that the proposed duties entail the specialization and complexity required by this criterion. Absent a meaningful description of the duties of the proffered position as the duties relate to the petitioner's business and substantiated by documentary evidence of the petitioner's business operations, the petitioner has not distinguished the proffered position based on the specialization and complexity of its duties from the routine duties of a market research analyst, an occupation that does not require knowledge usually associated with the attainment of a baccalaureate or higher degree in a specific field. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

Beyond the decision of the director, the petitioner has not established the beneficiary is eligible to perform the duties of a specialty occupation. The petitioner has provided an evaluation from a credentials evaluation service based on the beneficiary's foreign degree and work experience. The record, however, does not include evidence that the evaluator is qualified to assess the beneficiary's training and work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's training and/or work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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