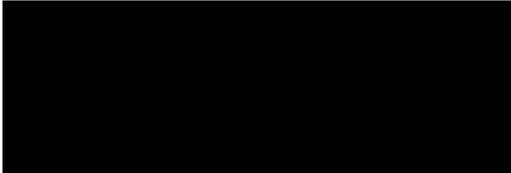




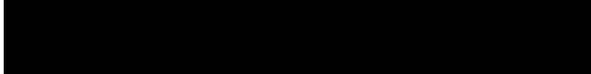
U.S. Citizenship
and Immigration
Services

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FILE: WAC 07 145 51138 Office: CALIFORNIA SERVICE CENTER Date: **JUN 02 2008**

IN RE: Petitioner: 
Beneficiary: 

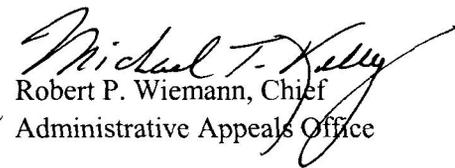
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

for 
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant petition. 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 involved in film production, was established in February 2007, claims to employ four personnel, and had not filed tax returns at the time of filing the petition as it was a newly established company. It seeks to employ the beneficiary as a research associate in film production. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding includes: (1) the Form I-129 filed April 2, 2007 and supporting documents; (2) the director's May 22, 2007 request for further evidence (RFE); (3) the petitioner's June 20, 2007 response to the RFE; (4) the director's July 12, 2007 denial decision; and (5) counsel's Form I-290B, brief, and documentation in support of the appeal. The AAO reviewed the record in its entirety before rendering its decision.

On July 12, 2007, the director denied the petition. The director observed that without contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and clients, the petition had failed to establish its financial viability and without financial records to examine, Citizenship and Immigration Services (CIS) could not determine the nature, complexity, and viability of the petitioner's business. The director determined that the petitioner had not submitted sufficient evidence to conclude that the petitioner's proffer of employment was authentic. The director further determined that the petitioner had not demonstrated that the types of duties to be performed are normal and customary requirements in similar organizations in the petitioner's industry and had not presented evidence that its organization had unique and specific needs for services characteristic of a specialty occupation for the period of time it intended to employ the beneficiary.

On appeal, counsel for the petitioner contends that the petitioner's predecessor had been in business since 2005 and that the petitioner's president has numerous motion picture credits and that the transition to a newly established company was a mere formality. Counsel notes that the beneficiary's employment was not to commence to October 2007 and thus the petitioner's business activities prior to October 2007 should not be dispositive. Counsel submits documentation to show the petitioner's current ongoing business activities including: the petitioner's invoices starting June 22, 2007; the first pay stubs issued to the petitioner's president and another employee dated August 2007; printouts of email transmissions dated in August 2007; and an option contract dated July 1, 2007. Counsel asserts that this information demonstrates that the petitioner is viable and requires the beneficiary's services as a market researcher.

The AAO disagrees with counsel's contentions. The petitioner must provide sufficient evidence that it will employ the beneficiary in a specialty occupation when the petition is filed. Counsel's assertion that the petitioner has transformed from an unincorporated business to an incorporated business is unsubstantiated. 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). Further, the petitioner must establish that it has a

specialty occupation position available when the petition was filed. The petitioner's plan to delay employing the beneficiary until a later time period is not relevant to establishing the availability of a specialty occupation position when the petition was filed. In this matter, the petitioner did not provide a combination of business documents, such as evidence of financing arrangements, a business plan, a lease for office space, a business license, bank statements, loan agreements, legal correspondence, or a comprehensive illustration of the beneficiary's duties sufficient to establish that it was a start-up company that had a specialty occupation position available for the beneficiary when the petition was filed. 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). In addition, as stated in *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998), "[t]he AAO cannot consider facts that come into being only subsequently to the filing of the petition." The documents submitted on appeal do not establish that the petitioner had a specialty occupation position available for the beneficiary when the petition was filed. For this reason, the petition will not be approved.

To further elaborate on the lack of evidence in the record establishing the proffered position as a specialty occupation, the AAO references Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), which 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 AAO also notes that 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.

CIS interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000).

The petitioner stated in its March 7, 2007 letter in support of the position that it sought to employ the beneficiary to perform the duties of a research associate with the following duties and responsibilities:

In this professional position, [the beneficiary] is responsible for the intensive market research primarily in the area of film, television and other productions. [The beneficiary] will gather, research and analyze local television production companies and networks and the types of programs they produce and broadcast to identify business opportunities for [the petitioner]. [The beneficiary] will use data gathering tools such as surveys and questionnaires and analyze the information gathered to develop detailed marketing and promotional strategies for expanding the markets and distribution of TV programs developed by [the petitioner]. She will produce[,] report and propose new marketing and filming strategies for the company.

The AAO finds that the above description does not provide a comprehensive description of the beneficiary's actual daily duties. The AAO turns first to the 2008-2009 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* to determine whether the proffered position may be established as a specialty occupation. The *Handbook* states the following with regard to the employment of market research analysts:

Market, or marketing, research analysts help companies understand what types of products people want and at what price. They also help companies market their products to the people most likely to buy them. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need. Often, they design surveys to assess consumer preferences through Internet, telephone, or mail responses. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls.

Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information also may be used to determine the advisability of adding new lines of merchandise, opening branches of the company in a new location, or otherwise diversifying the company's operations. Market research analysts also might develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The AAO acknowledges that the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs. It does not however, indicate that the degrees held by candidates must be in a field directly related to market research as required for classification as a specialty occupation.¹ Accordingly, the title of market research analyst does not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Moreover, the petitioner's description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention that it is offering the position of a market research analyst. The petitioner in this matter has offered a generic description of the beneficiary's market research duties, one that appeared to describe the occupation of market research analyst rather than that of a specific position. The petitioner borrows from the *Handbook's* descriptions of the occupation of a market research analyst in an effort to establish that the beneficiary would perform this work. However, a petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst gathers statistical data, devises methods and procedures for obtaining the data, and providing a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. Neither can the petitioner establish its employment as a specialty occupation by making conclusory statements regarding the position, rather than defining the activities associated with the position, for example, describing how the beneficiary assesses the market conditions for the petitioner. 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)). A generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in relation to its particular business interests. The description provided is insufficient to enable the AAO to analyze and ultimately conclude that the daily duties of the proffered position encompass the duties of a market research analyst.

¹ The AAO observes that in this matter, for example, the beneficiary's bachelor's degree is in cinema, not in marketing or a marketing related field.

As a result, the AAO finds the petitioner has failed to establish that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In addition, as the record does not establish the substantive nature of the work involved in the actual performance of the duties of the position as it relates to the petitioner's newly established business, it precludes the petitioner from demonstrating that the proffered position is parallel to any degreed position within similar organizations in its industry. Without a meaningful job description, the petitioner may not distinguish the position as more complex or unique than similar, but non-degreed, employment, as required by the alternate prongs of the second criterion. The petitioner has failed to establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

As the petitioner is a newly established company, the petitioner has not previously employed personnel in the proffered position; thus the petitioner has not established the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The petitioner has also failed to establish the position as a specialty occupation based on the specialization and complexity of the duties. Again, absent a meaningful description of the duties of the proffered position the petitioner cannot point to any particular generally described element of the description and contend that the position is so complex and specialized that it must be considered a specialty occupation. The record does not provide any evidence that the proffered position encompasses duties that are complex and specialized in regard to the petitioner's business. Without such evidence, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the totality of the evidence submitted in support of the petition, the petitioner failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reason. 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.