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U.S. Citizenship
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FILE: WAC 02 201 54833 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

MAR 04 2004

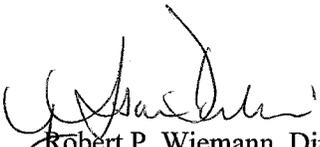
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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, Director
Administrative Appeals Office

DISCUSSION: The service center director 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 operates an auto parts store and seeks to employ the beneficiary as a business analyst. The petitioner 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, and because the beneficiary failed to qualify to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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 field 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 proffered position.

The record of proceedings before the AAO contains: (1) 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 with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business analyst. Evidence of the beneficiary's duties includes: the I-129 petition with attachment; the petitioner's response to the director's request for evidence; and counsel's brief on appeal. According to evidence with the I-129 petition, the beneficiary would: analyze and research market conditions on a national and international level to determine potential sales and services; interpret data concerning expenditures, prices, and future trends through daily statistical reports, utilizing knowledge of research and statistics technology to recommend improvements of operation and marketing methods and strategies; gather and compile information to keep informed of products, goods and service processes to forecast price trends; and prepare analysis reports on findings. The petitioner requires a minimum of a bachelor's degree in business administration for employment in the offered position.

The evidence submitted by the petitioner in response to the director's request for evidence changed significantly the duties of the proffered position. For example, the following duties were added in response to the request for evidence that were not included with the filing of the initiating petition: compile and analyze the company's existing financial records, such as income levels for the past five years, growth, quality of management, and potential financial risks the business may face; evaluate financial documents to forecast the company's future economic position; calculate budget requirements for the company; and organize and implement financial records maintenance systems to arrange and automate documents for easy retrieval. The purpose of the 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 or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 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. Neither counsel nor the petitioner may now change the title of the position or duties associated with it while the petition is pending.

The director found that: the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A); and the beneficiary did not qualify to perform the duties of a specialty occupation.

On appeal, counsel submits a brief stating that: the proffered position qualifies as a specialty occupation and meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1),(2) & (4); and the beneficiary qualifies to perform the duties of a specialty occupation.

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations, as asserted by counsel. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook* (*Handbook*) reports that the industry requires a degree; whether an industry 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. Min. 1999) (quoting *Hird/Baker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are similar to those noted for market research analysts in the *Handbook*. The duties provided, however, are vague and generic in nature and merely restate language contained in the *Handbook*. The duties listed do not permit an analysis of precisely what tasks the beneficiary would perform on a daily basis. As such, it is impossible to determine whether: a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; the degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, that the petitioner's particular position is so complex or unique that it can be performed only by an individual with a degree; or 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, therefore, failed to satisfy any of the criterion noted in 8 C.F.R. § 214.2(h)(4)(iii)(A)(1),(2) & (4). The petitioner does not contend that it meets the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Accordingly, the AAO shall not disturb the director's denial of the petition.

The issue concerning the beneficiary's qualifications to perform the duties of a specialty occupation shall not be addressed as it has been determined that the offered position is not a specialty occupation.

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 and the appeal shall accordingly be dismissed.

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