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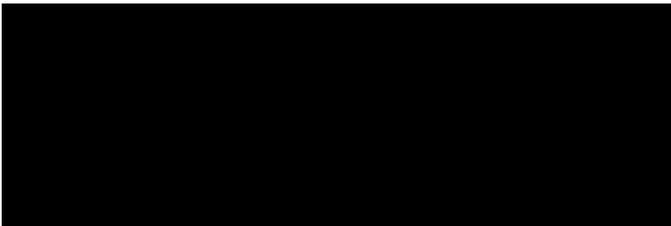
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FILE: LIN 03 089 52453 Office: NEBRASKA SERVICE CENTER Date: MAY 21 2004

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.

A handwritten signature in cursive script that reads "Marij Plussa".

Robert P. Wiemann, Director
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 provider of international travel and tourism services that seeks to employ the beneficiary as a tours development planner. 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

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.

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

The petitioner is seeking the beneficiary's services as a tour development planner. Evidence of the beneficiary's duties includes: the Form I-129; the January 14, 2003 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: analyzing research related to developing and improving international airline tours, and determining the popularity of tours; updating the operations and management of specialty tours; working with others such as indigenous community representatives, conservationists, and tourism operators for a sustainable tourism industry; developing new tours to meet the special needs of clients; and monitoring competition and market trends. The petitioner stated that a candidate must possess a bachelor's degree in travel and tourism or a closely related specialty in aviation, travel, and tourism management.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). In particular, referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position resemble those performed by travel agents, and that the *Handbook* reports that employers do not require a bachelor's degree in a specific specialty for this position.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel maintains that the petitioner is an international tours wholesaler that specializes in the design of tour itineraries and the creation of wholesale packages. Counsel emphasizes that the petitioner, a tours developer, does not employ travel agents, and furthermore, that the description of a travel agent in the *Handbook* and the Department of Labor's *Dictionary of Occupational Titles (DOT)* differs from the proffered position. Counsel stresses that the beneficiary will be engaged in research and planning; she will not provide retail services. Counsel submits two evaluations from alleged experts. According to counsel, Dr. [REDACTED] determined that: (1) the petitioner is a tours development company; (2) the proffered position requires a candidate holding a bachelor's degree in travel and tourism; and (3) the degree requirement is the international business standard. Counsel states that the second evaluator, Dr. [REDACTED] reached a similar determination. Last, counsel claims that the proffered position is integral to the company; that the petitioner presently employs, and has previously employed, persons in parallel positions with identical educational backgrounds; and that some of its employees have approved H-1B petitions.

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 first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty 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 *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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Counsel relies upon the two alleged expert opinion letters to claim that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the tour development planner position. Although relevant, the letters are deficient inasmuch as neither evaluator cites independent corroborating evidence to support

the claim that the proffered position requires a bachelor's degree in travel and tourism. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the unsupported assertions of the evaluators carry little weight in this proceeding.

Another of counsel's claims is that CIS has already determined that the proffered position is a specialty occupation since the CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, counsel's assertions are not sufficient to enable the AAO to determine whether the prior H-1B petitions are parallel to the instant petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

In determining whether a 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 *Handbook* for its information about the duties and educational requirements of particular occupations. A careful review of the *Handbook* reveals that the essential duties of the proffered position are analogous to those performed by tour and travel guides. Tour and travel guides plan, organize, and conduct long distance cruises, tours, and expeditions for individuals or groups; and also escort individuals or groups on sightseeing tours. Thus, similar to the proffered position, tour and travel guides do not spend most of their time advising clients about transportation, hotel accommodations, and car rentals; instead, they plan, organize, and conduct cruises, expeditions, and tours. The *Handbook* also reports that the training of tour and travel guides is mostly moderate-term on-the-job training. Consequently, the petitioner fails to establish the first criterion because a baccalaureate or higher degree or its equivalent is not the normal minimum requirement for entry into the occupation.

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to the two alleged expert opinion letters from Drs. [REDACTED] and [REDACTED]. Counsel claims that Dr. [REDACTED] stated that the degree requirement is the international business standard and that Dr. [REDACTED] averred that the degree requirement is the industry standard. However, the AAO cannot locate in the letters the statements attributed by counsel to Dr. [REDACTED] and Dr. [REDACTED]. And, as previously discussed, the evidentiary value of these opinion letters carries little weight in this proceeding. Absent from the record is evidence that would demonstrate that a bachelor's degree in a specific specialty is a minimum entry requirement for the proffered position.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The petitioner contends that it normally requires a degree or its equivalent for the position; thereby establishing the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Nonetheless, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation.

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 critical element is not the title of the position or 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already discussed, the duties of the tour development planner resemble those of a position that does not require a bachelor's degree – a tour and travel guide.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties 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. No evidence in the record establishes this criterion. Moreover, the *Handbook* reports that the proffered position is similar to a tour and travel guide, and therefore, would not require a bachelor's degree in a specific specialty.

As related in the discussion above, the petitioner has 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 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.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.