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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
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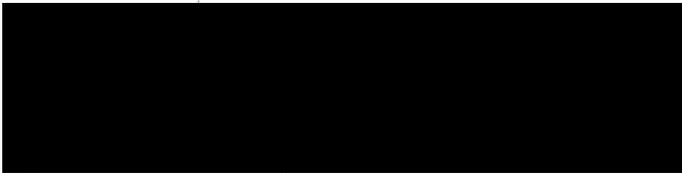


FILE: WAC 03 004 50470 Office: CALIFORNIA SERVICE CENTER Date: FEB 08 2005

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.

Michael T. Kelly
for Robert P. Wieman, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 retail distributor of beauty products, with seven employees. It seeks to hire the beneficiary as marketing research analyst. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) former counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with current counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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) 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 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 states that it is seeking the beneficiary's services as a marketing research analyst. Evidence of the beneficiary's duties includes: the Form I-129, with an August 30, 2002 letter of support from the petitioner; and previous counsel's response to the director's request for evidence, including a detailed listing of the beneficiary's duties.

In his denial, the director, while he found the duties of the proffered position to parallel those of a marketing research analyst, concluded that the position itself could not be classified as a marketing research analyst and, therefore, a specialty occupation. The director based his finding on a determination that the petitioner's retail business was not among the industries identified by the Department of Labor (DOL) as typically needing the services of a full-time marketing research analyst. On appeal, current counsel questions the basis for the director's decision, noting the director's statement that the list upon which he relied was "not all-inclusive."

Following its own review of the record before the director at the time of his decision, the AAO withdraws the director's finding that the proffered position is not a specialty occupation because the petitioner's business does not fall within those industries in which marketing research analysts are typically employed. It notes that the 2004-2005 edition of the DOL's *Occupational Outlook Handbook (Handbook)*, on which it routinely relies for information regarding occupations, states the following with regard to the employment of marketing research analysts:

Market or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need....

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....

Because of the applicability of market research to many industries, market research analysts are employed in most industries....

The AAO's withdrawal of the director's finding does not, however, establish the proffered position as a specialty occupation. Instead, the AAO's review of the record before it raises concerns regarding the reliability of the petitioner's description of its proffered position. These concerns preclude the petitioner from establishing its position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

At the time of filing, the petitioner's August 30, 2002 letter of support characterized the proffered position as that of a marketing research analyst and described the duties of the position as follows:

- Devise methods to increase profitability, manage expenses and reduce department overhead, including the analysis of statistics and other data to develop solutions to decrease overhead expenses;
- Analyze data and prepare recommendations for implementation of changes requested by clients;
- Examine and analyze demographic data to forecast future marketing trends;
- Review data on competitors, analyzing their fees and methods of marketing and distribution, make recommendations, and assist in implementation of the proposal; and
- Review and analyze proposals submitted by various departments to determine the benefits derived and the results that would justify expenditures.

However, in his June 13, 2003 response to the director's request for evidence, previous counsel submitted a lengthy, detailed list of duties, significantly different than those just noted. These duties, as summarized by the AAO, required the beneficiary to:

- Direct and execute studies which have major department and/or statewide policy implications and which may involve departmental reorganizations, liaison with staff from other agencies, as well as performing as a lead worker for interdisciplinary task forces, to provide management with information necessary for decision-making and long-range organizational or systems planning in areas such as records and publications management, policy and procedures development/analysis, organization of office space, work and information flow, systems analysis/design, data processing, fiscal and budgetary analysis, cost/benefit analysis, review of legislation, and analysis of organizational structure; and perform audit and quality assurance functions in providing lead-work direction and review;
- Analyze operating divisions to improve/modify organizational structure/work methods, systems and/or procedures, and write reports on the results of the analysis;
- Revise procedures and forms to increase effectiveness of existing systems by reviewing present manuals, literature and forms;

- Plan and assist in the installation of new methods and procedures so that anticipated benefits are realized with minimum disruption of operations by preparing bulletins or manual material needed for implementation, as well as instructions to operating personnel;
- Evaluate policy, rules, operations, work procedures and/or work methods in the department to provide assistance in solving managerial procedural problems, including the development of work plans and the assignment of priorities and time limits;
- Plan and implement altered work procedures, simplified and improved techniques to assist the department in meeting operating needs with greater efficiency;
- Develop long-range administrative and management strategies to resolve organizational issues by clarifying the scope of issues and assigning responsibility and tasks to various personnel;
- Consult/advise departmental decision makers, or others on events or program conditions to communicate significant developments and issues by performing a complete analysis and inventory report; and
- Supervise subordinate staff by assigning and controlling work, providing training, and making recommendations concerning hiring and disciplinary actions.

In providing this listing, previous counsel specifically referenced the petitioner's description of its proffered position in its August 30, 2002 letter of support, noting that the occupation of marketing research analyst required an in-depth understanding of market tendencies, the gathering and analysis of data using precise mathematical methods, the production of reports, and the making of predictions regarding the need for the petitioner's services. However, the above listing of duties does not reflect either previous counsel's statements regarding the marketing focus of the proffered position or the petitioner's previous description of its proffered position. It appears, instead, to describe new employment focused on the internal management of the petitioner's business.

The purpose of a 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). Therefore, when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. A petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As a result, the AAO will not consider the list of duties provided by previous counsel in response to the director's request for evidence.

In situations where a petitioner materially amends the description of a position, it is usually to supplement or otherwise enhance the duties described at the time of filing. In the instant case, however, the list of duties offered in response to the director's request for evidence cannot be viewed as enhancing those previously identified. Instead, the petitioner's August 30, 2002 letter of support and former counsel's response to the director's request for evidence offer inconsistent descriptions of the beneficiary's duties, descriptions that appear to outline two different occupations.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). However, neither the petitioner, nor counsel, has addressed the differing descriptions of the proffered position that appear in the record. As a result, in light of the concerns raised by the list of position duties submitted in response to the director's request for evidence, the AAO concludes that the petitioner's original statements regarding the beneficiary's duties cannot serve as a reliable description of the proffered position. Further, the description of the proffered position's duties submitted by previous counsel also calls into question whether the position for which the petitioner is seeking the beneficiary's services was that described by the petitioner at the time of filing. Doubt cast on any aspect of a petitioner's proof may 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)

Even considering the job duties as described at the time of filing, the petitioner has failed to establish its position as a specialty occupation. The petitioner's August 30, 2002 letter of support provided only a vague, generic description of the duties of a market researcher, rather than a listing of the specific duties to be performed by the beneficiary in the context of its business. Further, there is nothing in the record that supports the petitioner's assertions regarding its need for a market research analyst based on its expanding operations. The same is true of counsel's statement regarding the petitioner's increased need for a market research analyst based on its acquisition of two new stores since the date of filing. There is nothing in the record to document this assertion. Simply going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Further, the assertions of counsel, absent documentation, cannot serve as evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988).

As the record presents neither a specific description of the duties of the proffered position, nor documents the context in which those duties will be performed, it cannot establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services.

This decision is reached on grounds other than those relied upon by the director. The AAO, however, reviews appeals on a *de novo* basis and has the authority to deny petitions that fail to comply with the technical requirements of the law, even if the basis for the AAO's denial was not identified 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).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, although the AAO has withdrawn the director's finding that the proffered position is not a specialty occupation based on the nature of the petitioner's business, it 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.