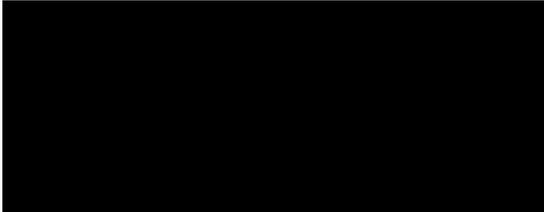


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**U.S. Citizenship
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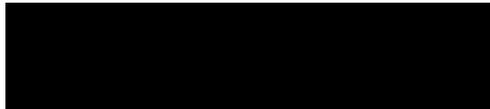
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FILE: WAC 03 101 53639 Office: CALIFORNIA SERVICE CENTER Date: **JUL 21 2005**

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:

SELF-REPRESENTED

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 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 non-profit organization that provides marine education and research. It seeks to employ the beneficiary as a marine life tour guide. 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. On appeal, the petitioner submits a brief and previously submitted evidence.

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.

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 marine life tour guide. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail serving as a crew member onboard a small vessel; giving oral presentations on marine life; life-guarding, swimming, and free-diving; providing food and beverage service; cleaning and organizing the galley; handling merchandise and concession sales; answering customer questions; assisting passengers with motion sickness; taking inventory and ordering supplies; and participating in the yearly whale day event. The petitioner's August 13 2003 letter elaborated on the beneficiary's duties. The petitioner asserted that the proffered position requires a bachelor's degree in science.

The director found the proposed duties relating to an educator could require a degree; but he also determined that the proposed position failed to qualify as a specialty occupation because 50 percent of the duties do not relate to a specialty occupation. The director indicated that the submitted evidence did not show that the petitioner normally requires a baccalaureate or higher degree; that the proposed duties and stated level of responsibility indicated complexity or authority that is beyond what is normally encountered in the occupational field; that the job offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree; or that baccalaureate-level training is an industry-wide requirement for entry into the proposed position.

On appeal, the petitioner narrates an amended job description, indicating that the new duties, which relate to education and marine research and are 75 percent of the position, require specialized knowledge and skills associated with baccalaureate-level education and experience in marine research. The petitioner explains that the proposed position, an amalgam of a biologist, educator, and researcher, requires the ability to:

[A]nalyze and interpret biological research results from a variety of marine science sources and to report or teach such results via lectures to students in educational institutions, and to the public in an educational fashion aboard a vessel.

The petitioner asserts that the August 13, 2003 letter and job announcement evince that it normally requires a bachelor's degree for the proposed position. No evidence, the petitioner states, reveals that baccalaureate-level training is not an industry-wide minimum requirement for entry into the occupation.

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 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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.

On appeal, the petitioner narrates an amended job description that materially expands the duties described in the Form I-129 and accompanying documents. However, on appeal or in response to a request for additional 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 the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

There is a significant discrepancy in the description of the proposed position. The December 2, 2002 letter indicates that the beneficiary will "prepare approximately six educational outlines for trips." One of the August 13, 2003 letters indicates that the beneficiary will teach marine biological principles to adults and children, spending 50 percent of her time as an educator. The H-1B petition indicates that the beneficiary will "give oral presentations on marine life." This evidence is at odds with the petitioner's document for the Maui Job Faire 2002, which is entitled "Marine Life Tour Guide/Naturalist"; it does not convey that the proposed position involves educating the public. 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). Nothing in the record explains or reconciles this discrepancy. Furthermore, the petitioner does not provide sufficient detail of the beneficiary's alleged educator duties; the AAO, therefore, cannot perform a meaningful analysis of whether or not they would require baccalaureate-level knowledge in a specific specialty, especially in light of the petitioner's August 13, 2003 letter, which indicates that the naturalist will work on eco-adventure trips.

Because it has not established that the proffered position is one for which the entry-level requirement is normally a bachelor's degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner submits no evidence to establish the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a specific degree requirement is common to the industry in parallel positions among similar organizations; or, alternatively, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The AAO has already set forth in this decision why the proposed position fails to qualify as a specialty occupation.

To establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), that the petitioner normally requires a degree or its equivalent for the position, the petitioner refers to the August 13, 2003 letter and job announcement. Collectively this evidence is insufficient to establish a past practice of requiring a bachelor's degree in a specific specialty for the proposed position. Furthermore, 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 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.

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. The AAO has already explained in this decision why the proposed position fails to qualify as a specialty occupation. This record contains no evidence of specialization and complexity of duties that would merit approval of the petition by this last criterion.

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.