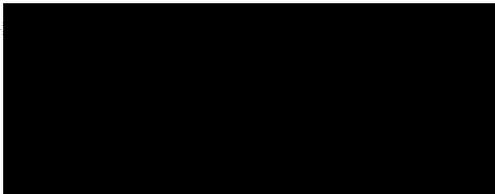




U.S. Citizenship
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Services

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FILE: WAC 04 070 50299 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 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:

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 medical facility and spa. It seeks to employ the beneficiary as a market research analyst. 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, counsel submits a brief.

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 regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(*J*) states that the H-1B classification applies to an alien who is coming temporarily to the United States to perform services in a specialty occupation.

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 market research analyst. 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 gathering and analyzing information and statistical data on past revenues to predict future revenues and marketing trends; gathering data on competitors and analyzing their prices, sales, and methods of marketing and using the information to advise about new services, opening new branches, or diversifying business operations; devising methods and procedures for obtaining information and statistical data; designing telephone, personal, or mail interview surveys to assess the preferences and buying habits of existing clients and potential clients; conducting opinion research to determine the general market attitude and acceptance of the different services offered and to create a marketing campaign based on customer preferences; evaluating the gathered data and making recommendations based on the data; advising management regarding promotions, distribution, design, and pricing of the petitioner's services. In the February 2, 2004 letter, the petitioner elaborated on the proposed duties. The petitioner requires a bachelor's degree in economics, marketing, statistics, or a related field for the proposed position.

The director stated that some of the proposed duties reflect those of a market research analyst as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). But the director stated that sole reliance on the *Handbook* and other governmental publications to demonstrate that a position is a specialty occupation is misplaced. When determining whether a position qualifies as a specialty occupation, the director stated that each position must be evaluated based on the nature and complexity of the job duties, and that performing incidental specialty occupation duties is insufficient to establish that a position is a specialty occupation. The director also stated that the beneficiary's degree in a related area does not guarantee the position is a specialty occupation. The director was not persuaded to classify the proposed position as a market research analyst because the petitioner's business did not extend beyond the local community, and lacked a consumer base that required the services of a marketing and/or sales staff. The director found that the petitioner did not have the organizational complexity to require the services of a market research analyst. No evidence establishes, the director stated, that the petitioner had marketing staff or specialists to gather data or sales representatives to implement advertising or sales campaigns as a result of the research performed and recommendations made by the market research analyst. Nor did the director find that the petitioner's business ever produced advertising or sales campaigns through in-house account, creative, and media services departments. The director concluded that the beneficiary would perform these duties, which are not of a specialty occupation. According to the director, even if the beneficiary were performing some market analysis, that duty would be incidental to the primary duties and are insufficient to establish that the proposed position qualifies as a specialty occupation. The director determined that the proposed position requires some market analysis, but that the petitioner is not in an industry that the *Handbook* describes as employing market research analysts on a part-time or a full-time

basis for any significant length of time. The director found the proposed position similar to a marketing manager, which the *Handbook* reveals is not a specialty occupation. The director discussed the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), finding that the petitioner established none of them.

On appeal, counsel states that the petitioner requires the services of a market research analyst on a full-time basis, and that this is more cost effective than retaining the service of an outside market research analyst. Counsel states that the petitioner employs a team of experts, which are described in the Life Well Institute brochures as treating patients and clients. Counsel states that the petitioner has experienced growth that extends beyond the local community, and references financial documents, a mailing list, and an organizational chart to substantiate this. According to counsel, the petitioner is embarking on an expansion plan to compete in the health and wellness service industry, and to increase market exposure and product distribution. Counsel references and discusses evidence about the medical and health spa industry, asserts that companies in the industry require a bachelor's degree for the proposed position, and submits three job postings to support this assertion. Counsel also discusses bachelor's programs in various colleges.

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.

On appeal, counsel claims that the petitioner has experienced exceptional growth in its size and income, and number of clients and employees, and that due to this growth and stiff competition the petitioner requires the services of a market research analyst. However, no evidence demonstrates that the petitioner has experienced growth in any of these areas. The petitioner submitted only one income tax return for 2002, which is insufficient to demonstrate income growth over a period of time.¹ The evidence does not establish that the petitioner increased its staff or employs "a highly professional team of experts." The organizational chart does not show employment of physicians, licensed physical and occupational therapists, licensed nutritionists and dietitians, and licensed hypnotherapists. The evidence, including Forms W-2 for 2003, and DE-6 Forms for 2003, reflects that the petitioner employs a small staff: a medical assistant, a president (who seems to provide services as a cardiologist), and a medical biller. The petitioner uses the services of independent contractors. Exhibit I, a list of names and contact information, does not demonstrate that the petitioner experienced a dramatic increase in clientele over a period of time or that it has or seeks clientele from across the country. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO's conclusion, from the evidence to which it has referred, is that the petitioner fails to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) since no evidence establishes that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation as required by the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). Counsel asserts that the petitioner seeks the services of market research analyst due to its dramatic growth. But the evidence in the record does not show that the petitioner

¹ The income of \$699,783 shown in the Form 1120, U.S. Corporation Income Tax Return for 2002, pertains only to the medical facility, as the day spa opened in 2003.

experienced such growth. Thus, the reasons for employing a market research analyst are not supported by the record. The petitioner therefore fails to establish that the beneficiary would be coming temporarily to the United States to perform services in a specialty occupation as required by the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B)(I). As such, the petitioner satisfies none of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific degree requirement is common to the industry in parallel positions among similar organizations; the proffered position is so complex or unique that it can be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

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 on this ground.

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.