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U.S. Citizenship
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FILE: WAC 04 254 50989 Office: CALIFORNIA SERVICE CENTER Date: **AUG 02 2006**

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:



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.

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Michael T. Kelly
Robert P. Wiemann, Chief
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 is a real estate development and sales business that seeks to employ the beneficiary as a full-time market research analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 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 full-time market research analyst. Evidence of the beneficiary's duties includes: the I-129 petition; counsel's September 15, 2004 letter in support of the

petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: developing comprehensive marketing plans by researching the market in the western United States for real estate acquisitions, development, and re-sale; forecasting real estate market trends; gathering data on the petitioner's competitors and analyzing their prices, sales, and methods of marketing and distribution; collecting data on customer preferences and buying habits; developing marketing campaigns; and developing the petitioner's business plan. The petitioner indicated that the beneficiary is a qualified candidate for the job because she possesses a bachelor's degree in business administration and has four years of related employment experience.

The director found that the proffered position was not a specialty occupation because the job is not a market research analyst position; it combines the duties of a marketing manager with a real estate broker. Citing to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2004-2005 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the director's decision is factually erroneous. He states further that proffered position is primarily that of a market research analyst, and is not a marketing manager or real estate broker. He also states that the proffered position qualifies as a specialty 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 record's descriptions of the proffered position and the duties comprising it are limited to generalized functions that the petitioner has ascribed to the position, such as "[R]esearching the market for real estate acquisitions"; "Examining statistical data to forecast future real estate market trends"; "Using market research techniques to identify emerging markets for the petitioner"; and "Performing marketing studies of both the domestic and international real estate market." The petitioner has not identified methodologies or applications of specialized knowledge that actual performance of the position's functions would involve, has not provided details of concrete matters upon which the beneficiary would work. Nor has the petitioner explained or provided documentary evidence to establish how the beneficiary's actual substantive work would require at least a bachelor's degree level of knowledge in a specific specialty.

A position's qualification as a specialty occupation under the related statute and regulations is not accomplished by a petitioner's composing general duties that align with general duties that the *Handbook* or other DOL resources ascribe to a particular occupational category, for it is the actual performance requirements that determine the type and level of educational credentials necessary for a particular position. As a consequence of the lack of detail about the actual substantive work and associated educational requirements of the proffered position, the record lacks a reasonable basis for the AAO to conclude that the evidence of record satisfies any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO turns first to 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)).

At the outset, the AAO notes deficiencies in the record. Information on the petition that was signed by the petitioner's president on August 25, 2004 reflects that the petitioner was established in 2002, and has three employees and a gross annual income of \$600,000. The record, however, contains no evidence to support the petitioner's claim of three employees, such as quarterly tax returns. It is also noted that the petitioner's 2003 federal income tax return reflects no compensation of officers, salaries, or wages paid. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, on appeal counsel describes the petitioner as a "three person company." Again, the record contains no evidence of such employees. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the director that the proffered position is that of a marketing manager or a real estate broker. Nor does the AAO concur with counsel that the proffered position is that of a market research analyst. In view of the above discussion, the exact nature of the proffered position is not clear. Further, even if the AAO were to conclude that the proffered position was that of a market research analyst, as asserted by counsel, a review of the Market and Survey Researchers category in the 2006-07 *Handbook* does not indicate that a bachelor's degree in a specialty is required for a market research analyst position.¹ While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not describe the duties requiring a master's degree in a market research analyst-related field indicated in the *Handbook*. In view of the foregoing, the position does not satisfy the regulatory requirement for eligibility as a specialty occupation under the first criterion.

The record does not include any evidence regarding parallel positions in the petitioner's industry. The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard. Further, there is no documentation to support the complexity or uniqueness of the proffered position. Also, as evident in the earlier discussion of the generality of information presented about the proffered position, the record does not develop the position as sufficiently unique or complex to satisfy the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

¹ A review of the website of Marketing Research Association (MRA) at <http://www.mra-net.org/edevents/cguide2.cfm#3> finds that a wide variety of degrees is acceptable for entry into the industry including liberal arts, social science, and communications.

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As counsel does not address this issue on appeal, it will not be discussed further. The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The AAO here incorporates its discussion about the lack of concrete evidence about the proposed duties. The duties are not described in sufficient depth to establish the specialization and complexity required by this criterion. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.

Beyond the decision of the director, the record does not contain an evaluation of the beneficiary's credentials from a service that specializes in evaluating foreign educational credentials as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the record does not establish that the beneficiary is qualified to perform the services of a specialty occupation. For this additional reason, the petition may not be approved.

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.