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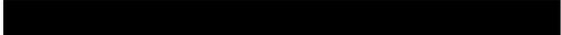
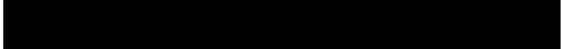
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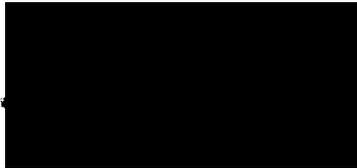
DZ

FILE: WAC 04 169 50584 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 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.

Robert P. Wiemann, Chief
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 medical laboratory, with 10 employees. It seeks to employ the beneficiary, who is already the beneficiary of an H-1B petition filed by a previous employer, as a quality assurance specialist. The director denied the petition based on his determination that the proffered position did not meet the requirements for classification as 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) the petitioner's responses to that request; (4) the director's denial letter; and (4) Form I-290B, with 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 quality assurance specialist. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s May 19, 2004 letter in support of the petition; and its October 19, 2004 response to the director’s request for evidence. As described by the petitioner, the duties of the proffered position would require the beneficiary to:

- Design, develop, and initiate standards and methods for inspecting, testing, and evaluating chemical, microscopic, and bacteriologic tests;
- Establish a program to evaluate the precision and accuracy of the laboratory equipment;
- Develop and implement methods for the safe disposition of large quantities of medical waste; and
- Compile and write training materials to ensure proper handling of the chemical, microscopic, and bacteriologic tests and the disposition of hazardous medical waste.

The petitioner has stated that the performance of the proffered position’s duties would require the minimum of a baccalaureate degree in chemistry or a related field.

To determine whether the above duties are those of 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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 his denial, the director, relying on the 2004-2005 edition of the DOL *Handbook*, found the job duties provided by petitioner to describe the employment of a science technician. On appeal, counsel contends that the director erred in reaching this conclusion, and that he failed to consider the more complex and supervisory duties to be performed by the beneficiary. She asserts that the proffered position is more closely aligned with the employment of a quality control or industrial engineer than that of a science technician. The AAO agrees with neither characterization of the offered employment. Instead, it finds the evidence of record to contain inconsistencies that preclude any determination concerning the nature of the duties the beneficiary would perform.

The petitioner has provided a list of broadly-defined quality assurance duties, several of which cannot be reconciled with information provided by the “Quality Assurance Policies and Procedures” section of the petitioner’s “General Policies and Procedures Manual. This material, submitted by the petitioner to establish “the type of work to be performed and supervised” by the beneficiary, appears to contradict the petitioner’s contention that it would employ the beneficiary as a quality assurance specialist. While the petitioner has stated that the beneficiary would coordinate quality control objectives and activities to resolve testing problems and administer a program to evaluate laboratory equipment, the manual indicates that responsibility for quality assurance within the petitioner’s organization is assigned to the petitioner’s laboratory director and/or technical supervisor. It states that these individuals are to “document and evaluate” laboratory performance. The petitioner has also asserted that the beneficiary would have responsibility for designing, developing and initiating the standards and methods for inspecting, testing and evaluating laboratory tests. However, the procedures manual indicates that the petitioner has a quality assurance process already in place and does not require the beneficiary to design or develop quality assurance standards.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. If such inconsistencies are not explained, the doubt cast upon the petitioner’s evidence 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, 591-592 (BIA 1988). In the instant case, the petitioner has submitted information that appears to contradict its statements regarding the duties of the proffered position. The record fails to address how the position’s duties fit within the petitioner’s existing quality assurance program or be distinguished from that program. Accordingly, the AAO finds the record to offer no reliable description of the duties of the proffered position, and, therefore, to prevent the petitioner from establishing the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Moreover, the inconsistencies in the record also preclude the petitioner from establishing that it would employ the beneficiary in a specialty occupation, as required by section 101(a)(15)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and the regulation at 8 C.F.R. § 214.2(h)(1)(ii)(B).

On appeal, as previously noted, counsel states that the beneficiary’s supervision of the petitioner’s clinical laboratory scientists and other medical technicians demonstrates the complex nature of her duties. The

beneficiary's supervisory responsibilities were not among the duties of the proffered position listed by the petitioner at the time of filing. Accordingly, they will not be considered by the AAO.

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). When responding to a request for evidence, a petitioner cannot, therefore, 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. 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). As the introduction of the beneficiary's supervisory responsibilities in response to the director's request for evidence represents a material change to the duties listed at the time of filing, they will not be considered.

On appeal, counsel also contends that the petitioner's degree requirement – a baccalaureate degree in chemistry – is common within its industry and has been established by the five Internet job advertisements for quality assurance specialists submitted by the petitioner. Counsel's reasoning is not persuasive.

To qualify a proffered position as a specialty occupation under the alternate prongs of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), a petitioner must prove that the degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The five online announcements for quality assurance specialists do not, however, respond to the requirements of the criterion's first prong. They do not establish that the jobs advertised are parallel to the proffered position or come from similar organizations.

The five listings are published by a reproductive technology company involved in advanced infertility testing, a pharmaceutical company, a company providing over-the-counter medicine and nutritional products, and two organizations that do not identify their businesses. They do not, therefore, constitute proof of a degree requirement among organizations similar to the petitioner, a business providing laboratory, x-ray and radiological services to medical facilities. Neither do they establish that the jobs advertised are parallel to the proffered position, as the record does not provide a meaningful job description against which to compare them.

On appeal, counsel contends that the submitted job listings are from employers similar to the petitioner and that one of the announcements is published by a company that provides services identical to those offered by the petitioner. However, as noted above, the announcements do not support counsel's assertions. Accordingly, they do not establish that the petitioner's degree requirement is the norm within its industry. Without documentation to support the claim, the assertions of counsel are not sufficient to meet the petitioner's burden of proof. The 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 record also fails to demonstrate that the proffered position may be distinguished from similar but nondegreed employment based on its complexity or unique nature. Although the petitioner has asserted the complex nature of the proffered position, its failure to provide a reliable description of the position's duties

precludes it from demonstrating that the offered employment is either complex or unique. Going on record without supporting documentation is not sufficient to meet 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)). Therefore, the record does not establish the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. Although at the time of filing, the petitioner stated that it normally required a degree or its equivalent for the position, the record does not indicate that the petitioner has previously employed anyone in the position of quality assurance specialist. Neither has the petitioner submitted evidence to establish that it has a practice of employing only degreed applicants when filling testing-related positions. Although it has indicated that several of its laboratory personnel have H-1B status, the record contains no proof of the degrees held by any of the petitioner's laboratory personnel. Going on record without supporting documentation is not sufficient to meet 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)). Accordingly, the proffered position has not been established as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner prove that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In response to the director's request for evidence, the petitioner asserted that the duties of the proffered position meet the specialized and complex threshold of the fourth criterion, noting the beneficiary's responsibility for the independent review and analysis of highly technical material. On appeal, counsel again raises these same responsibilities as proof that the proffered position qualifies as a specialty occupation. However, as previously discussed, the record does not offer a reliable description of the duties of the proffered position. Having failed to establish the duties to be performed by the beneficiary, the petitioner is precluded from proving they are of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial 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) (noting that the AAO reviews appeals on a *de novo* basis).

For reasons previously discussed, the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.