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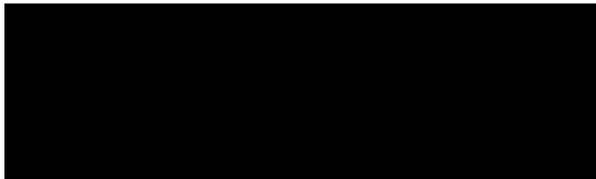
FILE: WAC 04 191 54580 Office: CALIFORNIA SERVICE CENTER Date: MAY 09 2006

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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 magazine publication business that seeks to employ the beneficiary as a full-time editor and multimedia producer. 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 editor and multimedia producer. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's May 16, 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: overseeing and managing all aspects of the editorial production of the petitioner's magazine and website; planning cover stories reflecting major issues and personalities from the Latin community; covering meetings, events, and stories as needed; contributing an original column for each magazine issue; setting editorial policy; reviewing content for libel, taste, style, accuracy, fairness, readership appeal, and relevance; staying abreast of industry research and trends; designing and producing content for the digital version of the magazine; developing and implementing a marketing plan for the petitioner's products and projects; and working closely with the editor of visual communication to design and produce a wide variety of formats and delivery vehicles. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in photography.

The director found that the proffered position, which is that of a desktop publisher, was not a specialty occupation. Citing to the Department of Labor's *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 proffered position combines the duties of an editor with a multimedia producer, and is not a desktop publisher position. Counsel states further that the record contains several pieces of evidence to show that the job of editor and multimedia producer requires the minimum of a bachelor's degree. Counsel also states that the record contains sufficient evidence to prove that the degree requirement is common to the industry. Counsel states further that the record contains ample evidence to corroborate the petitioner's assertion that it normally requires a degree or its equivalent for the proffered position.

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 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 including the number of people that the petitioner employs and the petitioner's claimed gross annual income. Information on the petition that was signed by the petitioner's owner/publisher on May 18, 2004, reflects that the petitioner was established in 2002, and has five employees and a gross annual income \$150,000. In response to the director's request for quarterly wage reports, counsel states in his September 21, 2004 letter as follows: "As of today, we only employ independent contractors. As such, we are not required to file the Form DE-6, Quarterly Wage Report." The record, however, does not contain any evidence of payment made to the petitioner's independent contractors. Counsel

also states in his September 21, 2004 letter that the beneficiary will supervise web developers and photographers. The record, however, does not contain any evidence that the petitioner employs web developers and photographers. Although the record contains an organizational chart reflecting 13 individuals in addition to the petitioner's owner/publisher, the record contains no evidence of their employment or the terms of their employment, nor does the organizational chart reflect that any of these individuals are web developers and photographers. Moreover, although the petitioner's gross annual income is reflected on the petition as \$150,000, the record contains no evidence in support of this claim. The petitioner's 2003 Schedule C-EZ (Form 1040), Net Profit From Business, reflects only \$14,010 in gross receipts. 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)). 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 unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook*, 2006-2007 edition, finds that a college degree is generally required for a writer or editor, and most employers prefer to hire individuals with a degree in communications, journalism, or English. This information indicates that in some instances a position such as the proffered position may qualify as a specialty occupation. The AAO does not concur with counsel that the proffered position is a specialty occupation, however, based on the deficiencies discussed above. Further, upon review of the proposed duties, it is not clear how the beneficiary could realistically perform duties such as supervising web designers when a review of the record contains no evidence that the petitioner employs in-house web designers.¹ Accordingly, it is unclear what employees the beneficiary will supervise. The record contains no explanation for this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

The record contains a letter from a film and video production instructor, who states, in part: "I have extensively reviewed the attached job description for an Editor/Multimedia producer. After careful analysis of the job duties, my opinion is that the position requires a minimum of a bachelor's degree because the duties are extremely specialized and complex." The writer does not analyze the proposed duties in the context of this petitioner's business matters, and does not establish that performance of the proposed duties for the petitioner would involve the theoretical and practical application of at least a bachelor's degree level of knowledge in a specific specialty. Further, this information is not convincing evidence that the position of an

¹ The petitioner's website at <http://www.tintalatina.net/> finds that the petitioner utilizes an outside business, Explorium Design, as its website designer.

editor/multimedia producer is a specialty occupation in this case, based on the deficiencies and discrepancies discussed above. In view of the foregoing, the petitioner has not demonstrated that a baccalaureate or higher degree in a specific specialty is required for the proffered position.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for various positions including video/multimedia producers and editors. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Further, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the duties described in the advertised positions, such as: providing editors, marketing, and technical support with technical assistance, consultation, and project management services for electronic titles and content; budgeting, scheduling, scripting, design and production planning, producing and directing video shoots, and supervising post-production graphics, animation, and editing; and proofreading, editing, formatting, and distributing news releases issued by client companies. Moreover, this information is not convincing evidence that the position of an editor/multimedia producer is a specialty occupation in this case, based on the above discussion. In view of the foregoing, the petitioner has not demonstrated that a baccalaureate or higher degree in a specific specialty is the industry standard for the proffered position.

The record also does not include any evidence from firms, individuals, or professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

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. On appeal, counsel states that the petitioner's prior independent contractors had a relevant degree. The record, however, does not contain any evidence of the petitioner's past hiring practices of independent contractors and, therefore, the petitioner has not met its burden of proof in this regard. Going on record without supporting documentary evidence is not sufficient for purposes 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)).

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. 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.

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.