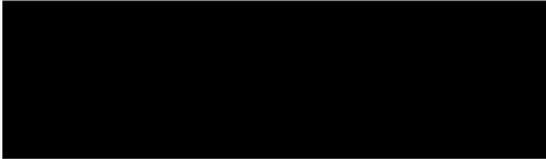




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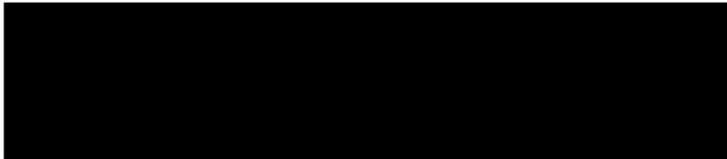
FILE: WAC 05 175 50460 Office: CALIFORNIA SERVICE CENTER Date:

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 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. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner corporation is a food importer, wholesaler, and distributor. In order to employ the beneficiary in a position that the petitioner designates as a financial analyst, the petitioner endeavors to classify him 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 based his denial of the petition on his conclusion that the petitioner failed to establish that the proffered is a specialty occupation. The director found that some of duties described for the proffered position comport with those that the Department of Labor's *Occupational Outlook Handbook (Handbook)* attribute to the financial manager occupation, which the director identified as a specialty occupation. However, the director determined that the evidence of record did not establish that the beneficiary' would actually work at a specialty occupation level. As evident in this excerpt from his decision, the director focused upon the extent of the record's information about the petitioner's business operations:

In the instant case, the evidence fails to establish that the petitioner's business is of the financial or organizational scope or complexity to credibly offer a position for a Financial Manager. The record fails to establish that the petitioner has a workforce so large as to require several divisions or departments each with its own budget, or so complex, that they would require oversight by a Financial Manager.

Consequently, there is no reasonable expectation that the petitioner's business could utilize the beneficiary in the capacity as a Financial Manager exclusively in overseeing of preparation of financial reports, directing investment activities, and implementing cash management strategies for the requested three year(s) validity period. For these reasons, the record is insufficient to establish a credible offer as financial manager.

On appeal, newly appointed counsel contends that the director misconstrued the evidence of record, and that the proffered position is primarily that of a financial analyst, the job title assigned by the petitioner. Counsel contends that the evidence supports the financial analyst designation and establishes the position as a specialty occupation.

The AAO bases its decision upon its consideration of the entire record of proceeding, which includes: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) former counsel's response to the RFE; (4) the director's denial letter; and (5) documents submitted on appeal by newly retained counsel: Form I-290B; a cover letter from newly retained counsel; a brief "to appeal the Service's decision," in the form of a December 20, 2005 letter to the service center; and documentary exhibits lettered A through E.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which [1] 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 [2] 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.

CIS consistently 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.

In its May 18, 2005 letter filed with the Form I-129, the petitioner stated that the beneficiary would be expected to:

1. Formulate methods and procedures to research and analyze economics, market, and financial condition of the industry;
2. Analyze data collected and generate reports to management concerning materials planning, production control, cost control, inventory control pricing and purchasing strategies and methods of marketing and distribution;
3. Study the company's operation procedures to identify stoppage of work flow, waste of resources, and other operational problems to devise methods of and procedures to optimize operations and to design/implement a better system of control over inventories and expenses;
4. Evaluate financial and statistical data project investment/reward and to make investment suggestions to the management; and prepare documents for management.

In his September 21, 2005 letter of reply to the RFE, former counsel provided the following "Response Concerning the Job Description":

The Financial Analyst, without supervising any employees, will be responsible for collecting and analyzing financial data to identify strategic business segments; operating cost benefit analysis and price evaluation to maximize profits.

Specially [sic], the petition entails the following job duties and responsibilities:

1. Formulate methods and procedures to research and analyze economics, market, and financial condition of the industry, approximate[ly] 12 hrs/week, 30%;
2. Analyze data collected and generate reports to management concerning materials planning, production control, cost control, inventory control pricing and purchasing strategies and methods of marketing and distribution, approximate[ly] 12 hrs/week, 30%;
3. Study the company's operation procedures to identify stoppage of work flow, waste of resources, and other operational problems to devise methods of and procedures to optimize operations and to design/implement a better system of control over inventories and expenses, approximate[ly] 8 hrs/week, 20%;
4. Prepare documents for management, approximate[ly] 8 hrs/week, 20%.

The AAO notes that initial counsel dropped the function that the petitioner had identified at paragraph 4 of its duty listing at the letter of support that it submitted with the Form I-129, namely: "Evaluate financial and statistical data project investment/reward and [] make investment suggestions to the management."

Each of the following three paragraphs about the quality of evidence about the petitioner's business and the proffered position should be considered incorporated into this decision's discussions of each criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). For efficiency's sake, they will not be repeated.

The petitioner has not provided substantial information about the specific business context that would generate and decide the substantive nature of the work that the beneficiary would do. The petitioner limits the record to generalized information about its operations, such as that it is "a food, importer, wholesaler and distributor" that "exclusively represents more than 15 different manufacturers from Asia and in the United States," that offers a wide range of products, that "has been experiencing tremendous growth and quadrupled its revenue," and that depends upon "financial analysis of the international food industry as [play[ing] a very important role for our continued business development and expansion." (Brief on appeal, at page 2.) Although the petitioner desires to hire the beneficiary to perform financial analysis, the record does not identify particular financial matters of the petitioner that require analysis. Further, the educational level required for the proffered position is not evident in the tax documents submitted into the record, and the record does not provide other business records to demonstrate the substance of the financial analysis upon which the petitioner says that it depends, or that illustrate the specific nature of the work that the beneficiary would perform.

As evident in the lists of duties above, the petitioner limits its information about the proffered position to generic descriptions of general functions, such as "formulat[ing] methods and procedures to research and analyze economics, market, and financial conditions of the industry"; "analyz[ing] data collected and generat[ing] reports to management concerning materials planning, production control, cost control, inventory control pricing and purchasing strategies and methods of marketing and distribution." Furthermore, the petitioner has not supplemented the record with memoranda, reports, or other documents that would illustrate the complexity, specialization, or uniqueness of the work expected of the beneficiary.

Because this record of proceeding is lacking in substantive information about the petitioner's business, its financial framework, and specific matters upon which the beneficiary would work, the AAO cannot reasonably ascertain the nature and level of education required to perform the duties of the proffered position. The record contains insufficient information for the AAO to reasonably ascertain the substantive nature of the beneficiary's work and to determine that it would require the practical and theoretical application of a highly specialized body of knowledge and at least a bachelor's degree, or the equivalent, in a specific specialty, as required by section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and the implementing regulations at 8 C.F.R. § 214.2(h)(4). The record does not substantiate counsel's contention that a bachelor's degree in a specific specialty is necessary for satisfactory performance of the proffered position. 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)). 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 petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As reflected in the above comments about the deficiency of evidence this proceeding, the record lacks sufficient substantive information about the proffered position to accurately identify it with any occupational category for which the *Handbook* indicates a minimum entry requirement of at least a bachelor's degree, or the equivalent, in a specific specialty. Further, the lack of substantive information about the proffered position precludes the AAO from finding that the proffered position would qualify as a specialty occupation position not specifically addressed by the *Handbook*.

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong requires the petitioner to establish that the specialized degree requirement is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. There are no submissions from professional associations, firms, or individuals in the petitioner's industry.

The other firms' job advertisements are not probative. They are too few to establish an industry standard. They do not all specify at least a bachelor's degree in a specific specialty. The record does not establish that the positions are parallel: the information about the proffered position and those advertised is insufficient for a reasonable comparison of their day-to-day performance requirements. The advertised jobs are not in the petitioner's industry, and there is no evidence establishing that the positions advertised are in organizations similar to the petitioner.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. As reflected in the discussion of the evidentiary deficiencies, as a consequence of the lack of concrete information about what performance of the position would involve, the attributes of complexity or uniqueness required by this criterion were not established.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), as the evidence of record does not demonstrate a history of normally recruiting and hiring for the proffered position only persons with at least a baccalaureate degree or its equivalent in a specific specialty.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in this decision's earlier

comments about the deficiency of evidence, the record does not establish the substantive nature of the work that the beneficiary would perform. The petitioner limits its discussions of the position's duties to general terms that lack the specificity necessary to demonstrate a level of specialization and complexity that is usually associated with at least a bachelor's degree in a specific specialty.

For reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.