

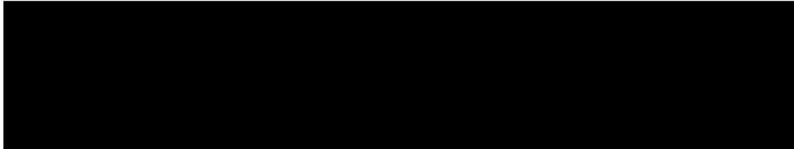


U.S. Citizenship
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FILE: WAC 05 220 52335 Office: CALIFORNIA SERVICE CENTER Date: JUL 12 2007

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 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 diamond wholesaler that seeks to employ the beneficiary as a part-time financial/credit 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 determining that the record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the 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 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 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) 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.

The petitioner seeks the beneficiary’s services as a part-time financial/credit analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s July 19, 2005 cover letter in support of the petition; and counsel’s December 28, 2005 response to the director’s request for evidence. The following is a paraphrased description of the proposed duties as stated by the petitioner:

Analyze and prepare all financial information relating to the company. Oversee and manage company’s overall financial plans and policies and implement cash management strategies. Gather all financial records and initiate preparation of reports by the bookkeeping staff and review its correctness. Prepare a summary of the company’s financial condition and recommend methods to increase profitability and reduce overhead costs.

Identify problem areas and prepare a financial plan to correct ineffective policies that will delay company’s growth such as credit and financing procedures extended to customers or obtained from creditors. Analyze firm’s budget and expenditures and review all purchase contracts. Assist the accountant in providing management with comprehensive analysis of the petitioner’s financial situation and prepare a report outlining findings and recommendations.

Research and analyze required capitalization for existing purchase contracts and proposed transactions. Assess advisability of any new purchase contracts taking into consideration company's current and projected financial condition, cash flow, and sales growth. Evaluate effect of past, present, and future marketing strategies in order to determine the petitioner's financial strength and capability. Audit existing contracts to determine profitability to the company.

Compute, interpret, and analyze data concerning return of investments, finance rates, planning and forecasting, including formulation and implementation of business strategies and goals. Summarize data describing current and long-term trends in the diamond industry and economic influences that can affect current and future pricing of diamonds.

Prepare financial documents needed by investors and/or creditors to prove financial stability of the company to fulfill current or prospective obligations. Monitor and control flow of income and disbursements to meet the business and investment needs of the company. Report on cash flow projections to determine the immediacy of obtaining additional investments or loans to meet cash requirements.

Review credit extended to existing clients and review credit applications by prospective customers. Submit recommendation to sales staff regarding credit available to customers and terms of the loan.

In his denial, the director cited the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, noting that the petitioner has not demonstrated that it requires the specialized services of a financial analyst. The director found further that the nature of the proffered position is unclear, as the petitioner has little or no capital to invest, and the actual daily duties appear to include the duties of an accounting clerk. The director concluded 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 asserts that the evidence demonstrates that the proffered position meets all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel submits the petitioner's 2004 tax return and states: "The gross annual sales of the Petitioner is \$21,350,435.00 thereby correcting the error of a previously stated gross annual income of \$700,000.00." Counsel contends that the corrected gross income figure substantiates that the petitioner's business is a type of business for which a financial analyst would be normally required. Counsel states that the petitioner has a client roster of over 900 locations in the United States, Hong Kong, Australia, and Belgium, and is in the process of expanding its business operations worldwide. In addition to a copy of the petitioner's 2004 tax return, counsel submits a list of the petitioner's major clients, a purchase invoice, excerpts from publications pertaining to financial analyst positions, the petitioner's organizational chart, the petitioner's job posting for the proffered position, and job postings for other financial analyst positions.

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.

Counsel and the petitioner limit their descriptions of the proposed duties to generic terms that do not convey either the content of the actual work that the beneficiary would perform or that the actual work performance would involve the critical and practical application of a bachelor's degree level of knowledge in a specific specialty, as required by statute and regulation to establish a specialty occupation. For instance, on appeal, counsel states that the beneficiary will "oversee and manage company's overall financial plans and policies," "prepare financial documents needed by investors and/or creditors to prove financial stability of the company to fulfill current or prospective obligations," and "evaluate effect of past, present and future marketing strategies in order to determine its financial strength and capability." The record of proceeding, however, neither provides examples of such documents nor establishes that the beneficiary's work on these documents would require the beneficiary to apply at least a bachelor's degree level of knowledge in a specific specialty. The same pattern follows with all the duty descriptions in the record. They consist of generalized functions that do not establish the level of knowledge that would be required when actually performed for this particular petitioner's business, a business about which the record contains negligible and inconsistent information.

The record in this matter is insufficient to establish the proffered position as a specialty occupation. As reflected in the above discussion, the petitioner has described the proposed duties in generic terms. The duties described neither relate specific work that the beneficiary would perform, elucidate concrete business matters of this particular petitioner that would be the focus of that work, nor exemplify how performance of that work upon those matters would require the theoretical and practical application of at least a bachelor's level of a highly specialized body of knowledge. Consequently, because the proposed duties are limited to generic terms that do not relate what they involve in actual performance to this specific petitioner's particular business matters, the petitioner has not provided sufficient information to satisfy any of the specialty occupation criteria. The AAO cannot accept a broad overview of a position as definitive of a particular occupation's daily duties. The petitioner must provide some evidence of the daily tasks the petitioner requires from the proffered position as it relates to its specific business. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. Each petitioner must detail its expectations of the proffered position and must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. To allow otherwise, essentially requires acceptance of any petitioner's broadly stated description, rather than a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary and what the proffered position actually requires.

The petitioner does not relate the nonspecific responsibilities described to the specifics of the petitioner's business nor does the petitioner define how these general duties apply to a specific discipline. Nor does the petitioner provide evidence of what the beneficiary does on a day-to-day basis. Only a detailed job description will suffice to meet the burden of proof in these proceedings. *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). As the duties of the proffered position are ill-defined and do not specifically correspond to the petitioner's business the petitioner cannot establish a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The record does not establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the generally described position. Accordingly, the petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The AAO now turns to a consideration of the proffered position pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or that a particular position is so complex or unique that only an individual with a degree can perform the duties associated with the position. The AAO acknowledges the Internet job postings submitted by the petitioner but observes that the advertisers are a retail jeweler, an agriculture firm, and a bank, organizations that are dissimilar to the petitioner. The petitioner has not provided evidence that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, level of revenue, or type of business. Moreover, as the record offers only a generalized description of the proffered position, the duties listed in the advertisements may not be established as parallel to those outlined by the petitioner.

The record does not include any evidence from individuals, firms, or professional associations regarding an industry standard. Again, as discussed above, the duties that comprise the proffered position are described in generalized terms that do not indicate the necessity of a body of highly specialized knowledge attained by at least a baccalaureate degree level of coursework in a specific specialty. Without a meaningful job description the petitioner cannot show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO usually 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 to aid in determining the third criterion. Although the petitioner indicates it was established in 1981, the record does not contain evidence that the petitioner previously employed anyone in the proffered position. The petitioner has submitted its job announcement for the proffered position on appeal. However, the petitioner's job announcement does not indicate the successful incumbent will have a bachelor's degree in a specific discipline. As referenced above, to prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. The petitioner has not sufficiently described the duties of the proffered position or provided other documentary evidence that would establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties. Again, the petitioner's general iteration of the duties of the proffered position cannot, without further detail, establish that the proffered position's duties

are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As previously observed, the description of the petitioner's proffered position is general and provides no understanding of how the duties relate to the specific needs of the petitioner.

The petitioner has not provided sufficient information to establish that the duties as generally described are duties that correspond to a position that is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In addition, the AAO observes that the record contains confusing and inconsistent information regarding the petitioner's business, its staff and their duties, and its organizational structure. For example, although the petitioner's president/general manager claims in his July 19, 2005 cover letter that the beneficiary's proposed duties entail "initiating preparation of reports by the bookkeeping staff and reviewing its correctness" and "submit[ting] recommendation to sales staff regarding credit available to customers and terms of the loan," the petitioner's organizational chart reflects only the following two employees, [REDACTED] who is the petitioner's president/general manager, and [REDACTED] who handles the petitioner's sales/finance component. As such, it is not clear to what bookkeeping and sales staff the beneficiary would supervise and make recommendations. Also, the petitioner's 2004 federal income tax return reflects only \$57,600.00 in salaries and wages. Given the size of the petitioner's business, it is not clear that the beneficiary would perform predominantly financial/credit analyst-related duties when the record indicates that the petitioner already has an employee who handles the petitioner's sales/finance component. Accordingly, the division of duties between [REDACTED] who handles the petitioner's sales/finance component, and the proffered part-time financial/credit analyst is unclear. The petitioner also provides inconsistent information regarding its number of employees, which is reflected as four on the petition, and as two on the petitioner's organizational chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Further, although counsel asserts that the petitioner is in the process of expanding its business operations worldwide, thereby necessitating the services of a financial analyst, there is no documentation of record that current expansion plans are underway or any of the specific requirements of those plans. 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 Obaighena*, 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 assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO notes counsel's reference to a district court decision and the author of an immigration resource book opinion that if a small employer can clearly document that the proffered position is a professional-level position, the petition may be approved. However, the basis of this decision does not rely on the nature or size of the petitioner to conclude that the proffered position does not meet any of the requirements for a specialty occupation; rather the AAO finds that the petitioner has not clearly documented the duties of the position in

relation to its business and has not substantiated its business operations, including its proposed expansion, its number of staff and the division of their duties, and its financial reporting requirements.

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 petitioner has not established the beneficiary is eligible to perform the duties of a specialty occupation related to finance. The petitioner has provided an evaluation from a credentials evaluation service based on both the beneficiary's foreign degree and her work experience. While the AAO will accept the evaluator's opinion regarding the beneficiary's foreign degree as equivalent to a bachelor's of science degree in agriculture from an accredited university in the United States, the record does not include evidence that the evaluator is qualified to assess the beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.

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.