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U.S. Citizenship
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Services

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FILE: SRC 05 198 51144 Office: TEXAS SERVICE CENTER Date: JUL 17 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 prepaid health insurance business that seeks to employ the beneficiary as a full-time market research 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 statement. 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) 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 full-time market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s June 6, 2005 cover letter in support of the petition; and counsel’s November 2, 2005 response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

[The beneficiary] will be responsible for several areas of marketing, specifically; her position involves preparing and outlining Market strategies and proposals and presenting them to our Board of Directors. Once approved, her duties will include implementing her Marketing proposals.

[The beneficiary] will be involved from the beginning of every Marketing Project, from idea to implementation. [She] will meet with Advertising Executives and relate to them the type of Advertising Campaign we wish to present to the public and our target demographic. This specialty occupation includes researching economic trends, and short and long term marketing decisions of the company; and marketing conditions in the local, regional and national areas to determine potential sales of our company’s insurance plans as well as development of research methods to gather data on competitors, pricing and prevailing conditions. This position also includes the responsibility for analyzing research results and preparing reports to Management.

In her denial, the director found that the proffered position does not require a bachelor's degree because counsel stated in his November 2, 2005 response that the proffered requires an "Associate degree of Arts in Advertising with experience in Financial and Marketing Analysis." The director also found that the petitioner's organizational chart reflected the beneficiary's position as "Member Services Manager." The director found further that the beneficiary is out of status, and that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Pursuant to 8 C.F.R. § 248.3(g), there is no provision for an appeal from the denial of a change of status. Furthermore, pursuant to 8 C.F.R. § 214.1(c)(5), there is no provision for an appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. As this office does not have jurisdiction over the portion of the director's decision regarding the beneficiary's request for a change of status and for an extension of stay, these issues will not be reviewed.

On appeal, counsel states, in part, as follows:

The petitioner submitted evidence in the form of documents describing the position offered as so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree. The position requires a baccalaureate degree and this requirement is common in the industry, or have the experience which is equivalent to a baccalaureate degree.

The Petitioner also submitted evidence that she has more than three years experience working in this field. This combination of education and experience qualifies the Beneficiary as a professional in her field.

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 "[P]reparing and outlining Market strategies and proposals and presenting them to our Board of Directors"; "[R]esearching economic trends, and short and long term marketing decisions of the company"; "[Researching] marketing conditions in the local, regional and national areas to determine potential sales of our company's insurance plans as well as development of research methods to gather data on competitors, pricing and prevailing conditions"; and "[A]nalyzing research results and preparing reports to Management." The petitioner has not identified methodologies or applications of specialized knowledge that actual performance of the position's functions would involve. Nor has the petitioner provided details of concrete matters upon which the beneficiary would work. The petitioner has not 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. Rather 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of a market research analyst. The petitioner has not demonstrated that the proposed job duties entail the level of responsibility of this profession. See the *Handbook*, 2006-2007 edition under Market and Survey Researchers. Further, both counsel and the petitioner indicate that the proffered position requires an associate's degree and related job experience. Although the proffered position may require an associate's degree and related job experience, the record contains no evidence to support counsel's assertion on appeal that the proffered position requires the equivalent of a related bachelor's degree. 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).

In addition, counsel fails to address the inconsistency pointed out by the director, namely that the petitioner's organizational chart lists the beneficiary's job title as "Member Services Manager" as opposed to "market research analyst." 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). 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Further, information on the petition that was signed by the petitioner's chief operations officer on May 20, 2005 reflects that the petitioner was established in 2002, and has six employees and a gross annual income of \$222,285.00. The record, however, contains no evidence to support the petitioner's claims, such as federal income tax returns and quarterly wage reports. Although the record does contain one quarterly wage report for the quarter ending on December 31, 2004, the petitioner left blank Part B #1 that requests the number of

employees. 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)).

In view of the above discussion, the exact nature of the proffered position is not clear. The petitioner has provided a generic description that does not detail the specific requirements of this petitioner who claims to have six employees and a gross annual income of approximately \$222,285 dollars. The AAO requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent in a directly related academic specialty. As the record in the instant matter offers no meaningful description of the proffered position's responsibilities, the petitioner has not established that the duties of the position actually incorporate the duties of a market research analyst. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first 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.

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).

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 petitioner has not established that the beneficiary is eligible to perform the duties of a specialty occupation. The record contains an evaluation prepared by Miami Academic Credentials Evaluators on May 10, 2005. Said evaluation indicates the beneficiary has the U.S. equivalent of an Associate of Arts in Advertising. An associate of arts degree is not equivalent to a four-year course of college-level study resulting in a bachelor's degree as required by this classification. Further, the record does not contain an evaluation of the beneficiary's work experience from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(I). 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.

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. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.