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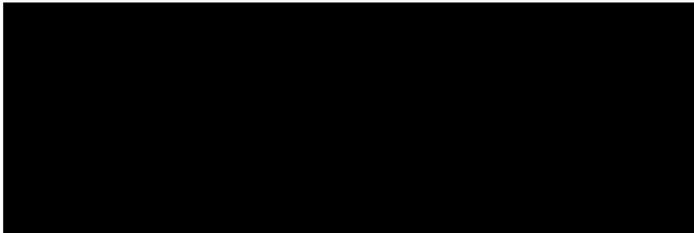
MAR 01 2007

FILE: LIN 05 030 51953 Office: NEBRASKA 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 acting director of the Nebraska 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 Form I-129 (Petition for Nonimmigrant Worker) describes the petitioner corporation's business as "Petroleum Products & By Products." In order to employ the beneficiary 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 acting director based his denial of the petition on two independent grounds, namely: (1) failure to establish the position as a specialty occupation; and (2) the petitioner's temporary loss of corporate status.

On appeal, counsel contends that the evidence of record establishes "not one but all of the elements" of Citizenship and Immigration Services (CIS) specialty occupation criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also submits documentary evidence that the petitioner's loss of corporate status, by administrative dissolution, was restored by the Secretary State of Missouri on October 21, 2004.

Counsel's submissions have adequately addressed the acting director's finding with regard to its corporate status, and, accordingly that basis of the denial is hereby withdrawn.¹ However, as discussed below, the evidence of record does not satisfy any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the director's decision to deny the petition is correct. Accordingly, the appeal shall be dismissed, and the petition shall be denied.

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 acting director's request for additional evidence (RFE); (3) counsel's response to the director's RFE; (4) the acting director's NOID; (5) counsel's response to the NOID; (6) the acting director's denial letter; and (7) on appeal: Form I-290B; counsel's brief, styled as "Petitioner's Brief in Support of Its Motion to Reconsider"; and the documents submitted with the brief, including copies of: (a) two Internet job advertisements for Financial Analysts, posted by firms other than the petitioner; (b) the Master Of Business Administration (MBA) diploma of the petitioner's president, and (c) a section of the Missouri Revised Statutes.

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

¹ The AAO notes, however, that, as of February 15, 2007, the Internet site of the Missouri Secretary of State, at www.sos.mo.gov/BusinessEntity/soskb/Corp.asp?378711, reports the petitioner's present corporate status as administratively dissolved, with an annual report last filed in 2005.

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.

The AAO finds that the evidence of record does not establish that the beneficiary will perform the duties described by counsel, in the context of the petitioner’s business. The petitioner must do more than recite a list of job duties. It must establish that it will employ the beneficiary in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). As the record is devoid of evidence establishing the petitioner’s business operations, the AAO is unable to determine

that the duties described by the petitioner will be performed. The record does not establish that the petitioner will employ the beneficiary in a specialty occupation.

In his May 25, 2005 letter of reply to the RFE, counsel provided the following list as “[a] detailed description of the day-to-day duties to be performed by the Beneficiary and percentage of time the Beneficiary will spend on each duty”:

- a. Perform strategic capital, market, operational, statistical, and economic planning, studies, and analysis (20%);
- b. Prepare detailed financial statements and business plans (20%);
- c. Analyze market trends, sales, prices, costs, expenses, tax rates, and competition to determine affect [sic] on company’s value, operations, sales, and future (20%);
- d. Conduct critical and detailed research and analysis to assess values and identify investment and acquisition opportunities, i.e., the takeover of other operations and failing locations (20%);
- e. Develop and articulate recommendations to buy certain commodities for price hedging (10%); and
- f. Review predictions and forecasts on the price of oil and oil futures (10%).

At pages 2 to 8 of the brief on appeal, counsel provides a “more specific and detailed list of the Beneficiaries duties.” This list contains (1) five sections (lettered “a” through “e”) that generally conform to the initial listing of duties, and (2) a total of 36 duties itemized under those sections. Some of the examples of the 36 itemized duties include: from *section a*: “Analyze energy policies in major consuming countries, and assess the impact on short-term oil demand”; partner with senior management in defining growth strategies and develop and manage strategic partnering relationships”; “Maintain relationships with private equity firms, venture capital firms, mutual funds, high net worth accredited investors, and other institutional investors”; from *section b*: “Evaluate tax incentives related to direct or indirect investments in the oil and gas sector due to presence of unconventional environments, intangible drilling costs, depreciation, tangible completion expenses, and possible depletion allowances”; “Perform market penetration, resource management, and financial strategy studies. Determine investment goals, return on investment, and spread of risk over multiple sub-sectors and geographic locations”; from *section c*: “Identify and evaluate private equity and venture capital transactions, and participate in client pitches and presentations”; “Execute industry/sector/company analysis, prepare projections & valuations, analyze financials, and perform further financial and legal due diligence”; from *section d*: Develop, implement and support commodities and futures trading, risk, credit, scheduling or settlement applications”; and from *section e*: “Support international growth activities and review international trading contracts for both treasury and tax related issues.”

As reflected below, the evidence of record about the petitioner’s business at the time the petition was filed is skeletal, and consequently it does not provide factual support for the reliability of the duty descriptions provided by counsel and the petitioner.

The only information provided about the petitioner’s business at the time the Form I-129 was filed is the information on the form itself, and is limited to the following. The petitioner corporation was established in 1998, and its business is stated as “Petroleum Products and By Products.” At the time it filed the Form I-129, the petitioner employed 6 persons. The petitioner stated its Gross Annual Income as \$575,000 and declined to relate its Net Annual Income. The address where the beneficiary would work is different than that

provided as the petitioner's corporate address,² but no details are given about the nature of the business operations at the address where the beneficiary will work.

In his May 25, 2005 letter replying to the RFE, counsel refers to the petitioner as "a blossoming corporation" without any information about the underlying business operations. In pertinent part, the RFE asked for concrete information about the petitioner's business, stating:

The business activity of the petitioner is not clearly defined. Please explain the activity of the organization as well as the type of products and/or services offered.

The only section of the RFE reply addressing this request for concrete information is this sentence:

6. The Petitioner's President owns and runs several businesses, including a gasoline station and convenience store, which sells food, beverages, and all types of merchandise for people traveling on the road.

In the context of the record of proceeding before the AAO, the number of businesses owned and run by the petitioner's president is irrelevant to establishing the performance requirements of the proffered position. The petitioner corporation is a legal entity separate from its president. Further, the record contains no substantive information about any business that would involve the beneficiary, including the petitioner's. There is no letter in support of the petition describing the petitioner's business. There are no tax returns, financial records, wage records or other documents establishing that the petitioner will employ the beneficiary in the duties described in the petition and on appeal. There is no evidence that the petitioner is a growing corporation or that it has finances to analyze. 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)).

The only specific type of business organization mentioned in the record is the above quoted "gasoline station and convenience store, which sells food, beverages, and all types of merchandise for people traveling on the road." It is not evident in the record that this business is that of the petitioner. Moreover, even if the petitioner's business is the gasoline station and convenience store, such business operations do not support the scope of duties described for the beneficiary on appeal.

The AAO also notes that the fact petitioner's president holds an MBA is not persuasive evidence under any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). The job advertisements submitted into the record are not probative. In light of the lack of substantive evidence of the petitioner's business operations, there is an inadequate foundation for comparing the advertised positions with the proffered position, whose actual performance requirements are in doubt. As inadequate as the record is about the business operations generating the actual work that the beneficiary would perform, counsel's reliance upon the Department of Labor's *Occupational Outlook Handbook* is mistaken. Without an adequate record as to the actual business operations that would generate the beneficiary's work and determine the theoretical and practical knowledge

² The AAO's February 15, 2007 search on the *Google* Internet browser site under the terms Hana & "5639 Telegraph Road, St. Louis, MO," the address listed at part 5 of the Form I-129 as the address where the beneficiary would work, revealed that *AllPages.com* lists a Hana AMOCO gasoline station at the address.

needed for his work, the AAO cannot reasonably evaluate the proffered position in terms of uniqueness, complexity or specialization.

Because the evidence of record does not establish the substantive nature of the petitioner's business operations, it does not establish that the duties described by counsel and the petitioner would actually be performed, and the AAO is unable to determine whether their performance would require at least a baccalaureate level of knowledge in a specific specialty. Contrary to counsel's assertion, the evidence of record does not satisfy any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). 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)(1), 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.

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. As noted above, the job advertisements from the other businesses are not probative, as there is no evidence establishing that the positions advertised are in organizations similar to the petitioner, or that the positions advertised are parallel to the proffered position. Further, 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.

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, as noted above, 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.

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.