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U.S. Citizenship
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Services

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MAY 31 2007

FILE: WAC 05 154 55840 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 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.

for Michael T. Kelly
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 transportation business that includes freight forwarding, trucking, and warehousing. It seeks to employ the beneficiary as a 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 based on his determination that the record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) 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) 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 market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 26, 2005 cover letter in support of the petition; and counsel’s October 3, 2005 response to the director’s request for evidence. As stated by the petitioner, the proposed duties are as follows:

Research market conditions in local, regional, or national areas to determine potential sales of service. Gather information on competitors, prices, sales and methods of marketing and distribution. Conduct research on economic trends and short and long-term marketing decisions of the company. Conduct research and prepares statistical reports on consumer preferences and feedback on the services provided to remain competitive in the market. Establish research methodology and design a format for data gathering such as survey, opinion polls or questionnaires. Examines and maintains database on research and information gathered. Use survey results to create a marketing campaign based on regional preferences and buying habits. Prepares reports and/or graphic illustrations of findings for management.

In his denial, the director found that the proffered position is similar to that of a marketing manager, a position that does not require a bachelor’s degree. Citing to the Department of Labor’s (DOL) *Occupational*

Outlook Handbook (Handbook), the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent. 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 duties described are those duties of a market research analyst, not of advertising, marketing, promotions, public relations, and sales managers. Counsel states further: “An explanation of the nature of the position and the applicant’s educational background clearly points out that the Bachelor’s degree in Economics is a realistic prerequisite to entry into the field.” Counsel also states that the petitioner submitted evidence of the petitioner’s expansion, which includes the creation of branches on the East Coast and in the Philippines, and that “a specialty occupation worker is required to make the expansion work.” Counsel submits the following as supporting documentation: the petitioner’s business documents and contracts; industry statistics; a sales quotation letter; a sample of a marketing incentive; and copies of previously submitted documentation including university curricula for a degree in economics, a credentials evaluation of the beneficiary’s foreign degree, and excerpts from the *Handbook*.

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 “Research market conditions in local, regional, or national areas to determine potential sales of service”; “Gather information on competitors, prices, sales and methods of marketing and distribution”; and “Conduct research and prepares statistical reports on consumer preferences and feedback on the services provided to remain competitive in the market.” 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 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. The documentation submitted by counsel including the university curricula for a degree in economics and the industry statistics are noted. The AAO cannot assume, however, that the additional training that the baccalaureate program provides and the industry statistics on the transportation, warehousing, and transportation arrangement industries are solely related to the alleged complexity of the proffered position. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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, for 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)).

At the outset, the AAO notes deficiencies in the record. Information on the petition that was signed by the petitioner's managing director on an undisclosed date, and by counsel on May 4, 2005, reflects that the petitioner was established in 1999, and has 12 employees and a gross annual income of \$7 million. Counsel also asserts on appeal that the petitioner has expanded. The record, however, contains no evidence to support the petitioner and counsel's claim of 12 employees, a gross annual income of \$7 million, and expansion, such as quarterly tax returns and federal income tax returns. 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)). Further, on appeal counsel also describes 2006 as "a very promising year" for the petitioner and submits contracts as evidence. It is noted, however, that not all of these contracts are properly signed. Again, 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 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. In view of the above discussion, the exact nature of the proffered position is not clear. Further, even if the AAO were to conclude that the proffered position was that of a market research analyst, as asserted by counsel, a review of the Market and Survey Researchers category in the 2006-07 *Handbook* does not indicate that a bachelor's degree in a specialty is required for a market research analyst position. While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not describe duties requiring a master's degree in a market research analyst-related field indicated in the *Handbook*. In view of the foregoing, the position does not satisfy the regulatory requirement for eligibility as a specialty occupation under the first criterion.

Regarding parallel positions in the petitioner's industry, counsel states: "Please see attached job postings from other companies to prove that the position normally [r]equires a bachelor's degree (Exh. 13)." On the same page of counsel's appeal, however, counsel states that Exhibit 13 contains "a sample of a marketing incentive

given away by the company (Exh. 13).” A review of the evidence of record finds no job postings or any other evidence regarding parallel positions in the petitioner’s industry.

The record also does not include any evidence from individuals, firms, or professional associations regarding an industry standard. As discussed herein, the duties that comprise the proffered position are described in generalized terms that do not indicate the necessity for a body of highly specialized knowledge attained by at least a baccalaureate degree level of coursework in a specific specialty.

For the reasons discussed above, the petitioner has not satisfied any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (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. In his October 3, 2005 letter, counsel states that the petitioner has never hired a market research analyst in the past. As such, the evidence of record does not establish this criterion.

It is further noted that regardless of any degree requirement imposed by the petitioner, the evidence of record does not substantiate a need for at least a bachelor’s degree in a specific specialty. CIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation, regardless of the petitioner’s past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner’s self-imposed employment requirements, then any alien with a bachelor’s degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

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.

Counsel states, on appeal, that the beneficiary’s duties, as described in his response to the request for additional evidence, “are [so] complex in nature that [they] require the expertise of a baccalaureate degree holder.” Again, counsel’s descriptions of the proffered position and the duties comprising it, as described in his response to the request for additional evidence, are limited to generalized functions, such as “Gather information in competitors, prices, sales and methods of marketing and distribution”; “Provide company with information needed to determine the advisability of adding new lines of merchandise, opening other branches or otherwise diversifying the company’s operations”; and “Design telephone, mail or internet surveys to assess consumer preferences.” As indicated earlier in this decision, the generalized descriptions of the proposed

duties do not develop the duties with sufficient specificity to establish a requirement for the level of knowledge requisite for this criterion.

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 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.