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U.S. Citizenship
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Services

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FILE: WAC 06 160 52189 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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 denied the nonimmigrant visa petition and dismissed a subsequent motion. 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 an insurance agency that seeks to employ the beneficiary as a marketing manager. 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 on four grounds: (1) her determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation; (2) her determination that the petitioner had failed to establish that the beneficiary qualifies to perform the duties of a specialty occupation; (3) her determination that the petitioner had failed to establish that it qualifies as a “United States employer”; and (4) her determination that discrepancies and conflicting information in the record, as well as the petitioner’s failure to respond fully to her requests for evidence, precluded approval of the petition.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director’s first request for additional evidence, dated June 26, 2006; (3) previous counsel’s September 15, 2006 response to the director’s request; (4) the director’s second request for additional evidence, dated October 18, 2006; (5) previous counsel’s January 9, 2007 response to the director’s request; (6) the director’s April 13, 2007 denial letter; and (7) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The AAO will first address the director’s finding that the proposed position does not qualify for classification as a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (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:

[A]n 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

The petitioner is an insurance agency with seven employees and stated gross annual income of \$250,000. In its April 5, 2006 letter of support, the petitioner stated that the duties of the proposed position would include developing pricing strategies; balancing the firm’s objectives with customer satisfaction; identifying, developing, and evaluating marketing strategies, based upon the beneficiary’s knowledge of the petitioner’s objectives, market characteristics, and cost and markup factors; evaluating the financial aspects of product development, such as budgets, expenditures, research and development appropriations, and return-on-investment and profit-loss projections; formulating, directing, and coordinating the petitioner’s marketing activities and policies to promote products and services, working with advertising and promotion managers; directing the hiring, training, and performance evaluations of marketing and sales staff, and overseeing their daily activities; consulting with product development personnel on product specifications, such as design, color, and packaging; compiling lists describing products and service offerings; and using sales forecasting and strategic planning to ensure the sale and profitability of products, lines, or services, analyzing business developments, and monitoring market trends.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The AAO notes that previous counsel, in her January 9, 2007 response to the director’s request for additional evidence, submitted information from the *Handbook* regarding the duties and educational qualifications of both marketing managers and market research analysts.

In reaching its own conclusions regarding the nature of the proposed position, the AAO has reviewed the discussion of market or marketing research analysts at pages 213-214 of the 2008-2009 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

[M]arket research analysts devise methods and procedures for obtaining the data they need. Often, they design surveys to assess consumer preference through Internet, telephone, or mail responses. They conduct some surveys as personal interviews, going

door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling and evaluating the data, market research analysts make recommendations to their client or employer. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening branches of the company in a new location, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The AAO finds that it is market research analysts' work in the design and analysis of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers.

The issue is not whether the proposed position requires the beneficiary to do any market research, which it likely does, but whether that market research duties actually rise to those of a market research analyst as delineated in the *Handbook*. As the petitioner does not indicate that the proposed position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, or to evaluate this type of research, the position does not reflect the work of a market research analyst. Therefore, the AAO does not find previous counsel's information regarding the educational qualifications of market research analysts relevant to this proceeding.

Instead, like the director, the AAO finds the market research duties associated with the proposed position to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies.

The *Handbook's* discussion of the duties of advertising, marketing, promotions, public relations, and sales managers states, at page 30, the following:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public . . . In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services, and they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

The *Handbook* states the following, at page 31, with regard to the educational qualifications required for marketing managers:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations. . . .

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, management, economics, accounting, finance, mathematics, and statistics are advantageous. . . .

* * *

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists. In small firms, where the number of positions is limited, advancement to a management position usually comes slowly. In large firms, promotion may occur more quickly.

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires a demonstration that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. The *Handbook* indicates that most marketing manager positions are filled on the basis of experience (most positions “are filled by promoting experienced staff or related professional personnel”). Moreover, the fact that some employers “prefer” a degree or that individuals possessing degrees “should have the best job opportunities” does not rise to this criterion’s standard of employers normally requiring at least a bachelor’s degree or its equivalent in a specific specialty. As such, marketing managers do not qualify as specialty occupations under the first criterion.

Moreover, employers that do require a bachelor’s degree do not require that it be in any particular field of study (“[a] bachelor’s degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable”). When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, can perform a job, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). 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. As noted previously, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) to require a degree in a specific specialty that is directly related to the proposed position.

The AAO also notes that the beneficiary possesses a bachelor’s degree in business administration. As the petitioner finds a bachelor’s degree in business administration acceptable for the proposed position, it is precluded from establishing the position as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). *Matter of Michael Hertz Associates* at 558. CIS has consistently stated that, although a general-purpose bachelor’s degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. See *Royal Siam Corp. v. Chertoff*, --- F.3d ---, 2007 WL 1228792 (C.A. 1 (Puerto Rico) 2007). Again, CIS interprets the degree

requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) to require a degree in a specific specialty that is directly related to the proposed position.

The AAO will accord no weight to the information counsel submits from the Department of Labor's *O*Net* system. *O*Net* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. Its assessment (the JobZone classification) does not specify the particular type of degree, if any, that a particular position would require. Again, CIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position.

Similarly, the AAO accords no weight to the information counsel submits from the *Dictionary of Occupational Titles (DOT)* and *Standard Occupational Classification System (SOC)*. As is the case with *O*Net*, the *DOT* and *SOC* are not persuasive sources of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The *DOT's* assessment (the SVP rating) is meant only to indicate the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and does not specify the particular type of degree, if any, that a position would require. The information from the *SOC* is unpersuasive as well, for the same reason. Accordingly, the AAO accords no weight to this information.

For all of these reasons, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings contained in the record of proceeding. However, counsel and the petitioner have failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

The petitioner has not submitted any evidence to demonstrate that any of these job postings are from companies "similar" to the petitioner, an insurance agency with seven employees. There is no evidence that the advertisers are similar to the petitioner in size, scope, and scale of operations, business efforts, and expenditures. Simply 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 Obaighbena*, 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).

True World Foods is, according to its advertisement, a seafood company. No information was provided regarding the business operations of MRS Associates, Inc. Nor was any information provided regarding the unnamed company advertising for a market research analyst position in Orlando, Florida, the unnamed company advertising for a market research analyst position in East Hanover, New Jersey, or the unnamed company advertising for a marketing manager position in Branchburg, New Jersey.

Moreover, the job postings are too few to establish an industry-wide standard. Also, the information regarding the duties and responsibilities of the advertised positions is general and does not support a meaningful comparison of their actual performance and specialty knowledge requirements to those of the proposed position. Thus, while relevant to this proceeding, the job postings submitted by counsel are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations, and they do not satisfy the requirements of the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Therefore, the proposed position does not qualify as a specialty occupation under the criteria set forth at the first prong of the second criterion.

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of marketing managers as discussed in the *Handbook*, which do not require a degree. The record contains no documentation to support a finding that the proposed position is so complex or unique that, in contrast to many marketing positions with no degree requirement, it can only be performed by an individual with at least a bachelor's degree, or its equivalent, in a specific specialty.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine the petitioner's ability to meet this criterion, the AAO normally 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. However, no such evidence has been submitted. Therefore, the petitioner has not established eligibility under this criterion.

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration that 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 of the proposed position 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. There is no information in the record to support a finding that the

proposed position is more specialized and complex than the general range of marketing manager positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. The evidence of record, as discussed above, does not establish that the nature of the duties is specialized and complex. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel states the following:

USCIS California Service Center ignored the binding precedents where H-1B approvals have been issued to the same petitioner.

The AAO disagrees. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior cases were similar to the proposed position or were approved in error, no such determination may be made without review of the original records in their entirety. However, if the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, the approval of those petitions would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to establish that its proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, and therefore the petition may not be approved, the AAO finds analysis of the other grounds of the director's decision unnecessary. Accordingly, the AAO will 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.