

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D-2

FILE: WAC 07 070 50974 Office: CALIFORNIA SERVICE CENTER Date: **AUG 05 2008**

IN RE: Petitioner:
Beneficiary:



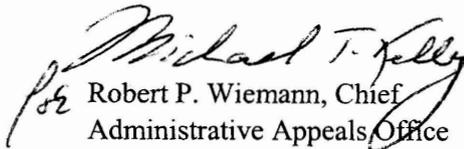
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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 an independent real estate business that seeks to extend its authorization to employ the beneficiary as an international 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 because the petitioner had not demonstrated that the proffered position is a specialty occupation or that a reasonable and credible offer of employment exists.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's requests for evidence (RFE); (3) counsel's responses to the RFEs; (4) the director's denial letter; and (5) the Form I-290B, with counsel's statement in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

Counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to counsel on June 4, 2008, informing him that no separate brief and/or evidence was received, to confirm whether or not he had sent anything else in this matter, and as a courtesy, providing him with five days to respond. In response, counsel indicated that he did not submit a brief and/or additional evidence. Thus, the record is considered complete.

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 petitioner seeks the beneficiary's services as an international market research analyst. Evidence of the beneficiary's duties includes: the petitioner's December 27, 2006 letter in support of the petition and counsel's July 27, 2007 response to the director's RFE. As stated by the petitioner, the proposed duties include:

- Consulting for real estate services, such as sales, financing, buyer/seller representation, leases, negotiation, and interpretation;
- Overseeing the buying and selling process to find the right investment for the petitioner's clientele;

- Offering a range of values through comparative market analysis including probable market value, and reviewing numerous factors including recent sales, property type and conditions;
- Identifying international markets for investments;
- Consulting the petitioner's international clientele on investment opportunities in U.S. markets;
- Identifying through extensive research market segments that meet the local requirements for quality, price and service;
- Creating and implementing marketing and business plans to penetrate the desired market to the petitioner's expected levels;

Updating and monitoring business options to keep customers informed of the ever-changing real estate market; and

- Integrating the strategic objectives of the U.S. sellers, buyers and developers with those of the clients to identify business opportunities.

The petitioner also asserted that the beneficiary would continue to "study the opening markets, collect data on clients' needs, and methodically develop the analysis of the markets here as well as in South America." The petitioner added: "This, of course, requires a professional with fluency in the Spanish language as well as English and with other professional skills." The record does not establish the range of studies that the beneficiary conducts, the types of data collected, the methodologies used, and the substantive nature of the analysis employed.

The director found that the proposed duties of the proffered international market research analyst position do not require a bachelor's degree, as the petitioner had not demonstrated that the scope of its business extends beyond the local community. The director also found that, as the petitioner's website identifies the beneficiary as a broker associate, the petitioner had not demonstrated that a reasonable and credible offer of employment exists. 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 states, in part, that the director has already approved a petition for the beneficiary in the proffered position. Counsel also asserts that the volatility of the current real estate industry warrants the hiring of a market research analyst.

Upon its own independent review of the complete record of proceedings, the AAO finds that the petitioner has established none of the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

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 Department of Labor's (DOL) *Occupational Outlook Handbook (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. While a review of the Market and Survey Researchers category in the 2008-09 *Handbook* finds that market research analysts are employed throughout the economy, the AAO does not concur with counsel that the proffered position is a specialty occupation, as the *Handbook* does not indicate that a bachelor's degree in a specific 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 provide a description of duties in a market research analyst-related field that would require a master's degree, as described in the *Handbook*. Moreover, neither counsel nor the petitioner addresses the director's findings that the beneficiary is identified as a real estate broker, not as a market research analyst, on the petitioner's website, and that the samples of the beneficiary's past work do not reflect any complex marketing analysis work, such as recommendations made to the petitioner's management based upon complex analysis and evaluation of data. It is incumbent upon the petitioner to resolve any inconsistencies/deficiencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies/deficiencies 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. at 591.

Counsel's assertion that the volatility of the current real estate industry warrants the hiring of a market research analyst, is noted. Neither counsel nor the petitioner, however, has demonstrated that the beneficiary's actual duties in relation to this petitioner's particular business matters would require the theoretical and practical application of at least a bachelor's level of a highly specialized body of knowledge. 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). 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)).

Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Counsel also asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding, however, does not contain all of the supporting evidence submitted to CIS in the prior case. In the absence of all of the corroborating evidence contained in the other record of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition. 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 case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition 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).

The record does not contain any evidence regarding parallel positions in the petitioner's industry. Nor does the record contain any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may 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. In the instant petition, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. 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 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 discussed above, counsel states on appeal that the beneficiary has already been approved for the proffered position. The petitioner's creation of a position with a perfunctory bachelor's degree requirement, however, will not mask the fact that the position is not a specialty occupation. 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 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. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 the 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 has performed H-1B level work since the filing of the initial petition. The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, neither counsel nor the petitioner has addressed the director's objections, and the record of proceeding lacks evidence of specific duties that would establish such specialization and complexity. Also discussed above, the *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for a market research analyst position. 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 or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding: the beneficiary possesses the equivalent of a Bachelor of Science in Industrial Engineering degree earned at a regionally accredited institution of higher education in the United States; and, in addition, the beneficiary has the equivalent of completion of three semesters of graduate study in marketing and related courses at a regionally accredited institution of higher education in the United States. The record, however, does not contain copies of the beneficiary's transcripts from the foreign institutions. Thus, the evaluator's conclusions about the beneficiary's educational equivalencies are not probative. CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.