

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

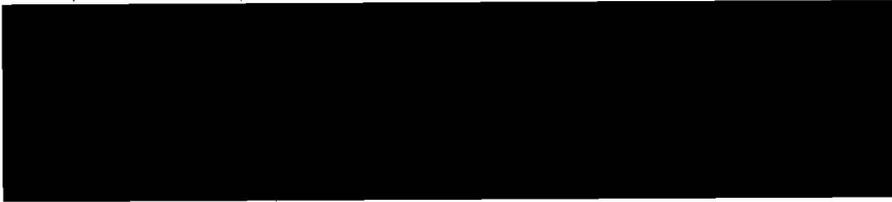
U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D2



FILE: SRC 06 037 50758 Office: TEXAS SERVICE CENTER Date: JAN 04 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 petitioner¹ is engaged in brokering orders for equipment and goods used in the petroleum industry and related fields. It seeks to employ the beneficiary as a part-time policy consultant. 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 proffered position is not 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 (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the 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.

¹ A search of the Texas Comptroller of Public Accounts website at <http://ecpa.cpa.state.tx.us/coa> on December 20, 2007 finds the status of the petitioner's business as "not good standing." In view of the foregoing, the petitioner's status as a U.S. employer is in question.

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 part-time policy consultant. Evidence of the beneficiary’s duties includes: counsel’s November, 2005 letter in support of the petition and counsel’s May 26, 2006 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

Apply the principles of public administration while assisting the company with their relations with large governmental entities in Mexico, the United States, and Canada. Identify laws, treaties, regulations, and applicable requirements of the United States, Canada, and Mexico regarding the petroleum business, including heavy equipment export-import. Survey the international business transactions in which the company participates and advise management of compliance or adjustments that should be made to the business’s activities. Propose systems and procedures that the company should follow in its business.

The AAO notes that, as reflected in the above listing of duties, the evidence of record lacks specific information about the substantive matters of the petitioner that would be the subject of the petitioner's work, and about the theoretical and practical applications of highly specialized knowledge that performance of the work would require. The record's exclusively generic and generalized information about the proffered position provides an insufficient factual basis for satisfaction of any of the specialty occupation criteria.

The director found that the proposed part-time policy consultant duties are similar to those of a purchasing manager, an occupation that does not require a bachelor's degree. Citing 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 in a specific specialty. 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 proffered position is that of a policy consultant, not a purchasing manager, as mistakenly assessed by the director. Counsel also states that the proposed duties - which entail identifying laws, treaties, regulations, and applicable requirements of the United States, Canada, and Mexico regarding the petroleum business, surveying the petitioner's international business transactions, advising management of compliance or adjustments that are needed, and proposing systems and procedures for the petitioner to follow - require the advanced professional-level knowledge and expertise acquired through a master's degree in public administration. Counsel compares the proffered position to a management analyst and submits excerpts from the DOL's *Handbook*, the *Dictionary of Occupational Titles (DOT)*, the *Occupational Employment Statistics (OES)*, and from the *Economic Research Institute (ERI)*.

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 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)).

Although the AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations, 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 DOL's *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. Although the AAO acknowledges that part of the proposed duties are generally reflected in the *Handbook's* description for Management Analysts, the AAO does not concur with counsel that the

proffered position is that of a management analyst/management consultant, which in private industry generally requires a master's degree in business administration or a related discipline. *See the Handbook*, 2006-07 edition. As discussed above, a petitioner cannot establish employment as a specialty occupation by describing the duties of the employment in the same general terms as discussed in sources outlining occupations. The petitioner does not detail specific tasks that would be performed by the beneficiary in connection with the petitioner's brokering services business. The petitioner must detail its expectations of the proffered position and must provide evidence of the duties that comprise the proffered position as they relate specifically to the petitioner's business. Although information on the petition reflects that the petitioner was established in 1990, has seven employees and a gross annual income of \$13 million, and while the record contains the petitioner's computer-generated tax and wage reports, the petitioner provides no evidence in support of these claims/computer-generated reports, such as federal income tax returns. Moreover, the petitioner does not provide any evidence of international business transactions that would necessitate the hiring of a policy/management consultant to perform duties such as: assisting with the petitioner's relations with large governmental entities in Mexico, the United States, and Canada; identifying laws, treaties, regulations, and applicable requirements of the United States, Canada, and Mexico regarding the petroleum business; and surveying the petitioner's international business transactions. 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)). 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). Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The record does not include any evidence regarding parallel positions in the petitioner's industry or from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations. 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 petitioner has not submitted sufficient documentation to establish that the duties of the proffered position involve duties that are complex or unique; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. 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 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.

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, the record of proceeding lacks evidence of specific duties that would establish such specialization and complexity. 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.

Although the director did not make a specific determination regarding the eligibility of the beneficiary to perform H-1B level services, the AAO observes beyond the decision of the director, that while the record contains a copy of the beneficiary's U.S. degree, it does not contain a copy of the corresponding transcripts or other evidence demonstrating the beneficiary's qualifications as required by 8 C.F.R. § 214.2(h)(4)(iii)(C). Thus, CIS cannot assess the credibility of the evaluation of the beneficiary's academic education. 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). For this additional reason, the petition will not be approved.

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.

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.