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20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: WAC 04 002 54238 Office: VERMONT SERVICE CENTER Date: **FEB 26 2007**

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:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn and the matter remanded for entry of a new decision.

The petitioner avers it is an Asian supermarket with 17 employees and 2.5 million dollars in gross annual income. It seeks to employ the beneficiary as a marketing specialist. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 petitioner finding that the beneficiary was not qualified to perform the services of a specialty occupation.

The record of proceeding before the AAO contains: (1) the October 1, 2003 Form I-129 with supporting documentation; (2) the director's October 10, 2003 request for further evidence (RFE); (3) a December 19, 2003 response to the RFE; (4) the director's January 14, 2004 decision denying the petition; and (5) the Form I-290B, and petitioner's statement on appeal. The AAO reviewed the record in its entirety before issuing its decision.

To obtain approval for an H-1B visa petition, the petitioner must establish that the duties of the proffered position comprise the duties of a specialty occupation and that the beneficiary is eligible to perform the duties of a specialty occupation.

The petitioner must first 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.

CIS 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.

The petitioner's September 10, 2003 letter in support of the petition indicated that the beneficiary in the position of "marketing specialist" would:

Analyze and research demographic market condition [sic] to develop a detail[ed] marketing strategy specifically targeting International clientele. Negotiate contracts, analyze market trends and market channels for Asian ethnic goods.

The petitioner also provided an August 15, 2003 credentials evaluation of the beneficiary's foreign bachelor of arts degree in economics with a minor in mathematics.

On October 10, 2003, the director issued an RFE, requesting information regarding the beneficiary's qualifications to perform the duties of a specialty occupation. The director noted that the petitioner "is attempting to establish that the beneficiary qualifies to perform services in a specialty occupation based on a combination of education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and that the beneficiary has recognition of expertise in the specialty through progressively responsible position directly related to the specialty." The director asked for documentation substantiating that the beneficiary had recognition of expertise in the specialty as well as other information relating to the beneficiary's qualifications. The director also asked for affidavits or declarations from the beneficiary's former employers as well as a list of all of the petitioner's employees and the petitioner's organizational chart.

On December 19, 2003, petitioner's former counsel provided the same evaluation of the beneficiary's foreign degree, two letters from two of the beneficiary's prior employees, the petitioner's organizational chart, and a list of 12 employees.

On January 14, 2004, the director denied the petition. The director mistakenly identified the petitioner as "[REDACTED]" although the director recited the same description of duties as the petitioner in this matter provided

for the proffered position. The director determined that a market specialist requires an advanced or graduate degree to perform the duties of the position. The director determined that although the beneficiary had a baccalaureate degree, the petitioner had not provided a credentials evaluation that demonstrated that the beneficiary's employment experience was experience in a specialty occupation or that the beneficiary's employment background correlated with a bachelor's degree in business with a major in accounting. The director concluded that the evidence of record did not establish that the beneficiary had a bachelor's degree or equivalent in the specialty occupation of market analyst, and thus was ineligible for employment in a specialty occupation.

On appeal, the petitioner asserts that the director's decision is unintelligible and contends that the statements made in the decision are erroneous, contradictory, or pose questions that the petitioner cannot answer.

The AAO agrees and thus withdraws the director's January 14, 2004 decision and remands the matter for the entry of a new decision. Examination of the record reveals issues that the director must address when making the determination on the merits.

The AAO notes that the director has failed to address the inadequacy of the petitioner's description of the proffered position; thus it is not possible to conclude that the duties of the proffered position are indeed the duties of a specialty occupation. The AAO notes that CIS does not rely on a position's title to determine whether the particular job qualifies as a specialty occupation. Rather, it is the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations that are the 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 directs that a request for additional evidence be issued, requesting a more detailed job description and any other evidence that might establish whether the petitioner's proffered position satisfies the criteria of a specialty occupation. In addition, if the director finds the credentials evaluation of the beneficiary's foreign degree suspect, the director should identify any inconsistencies and request any documentary evidence that would substantiate the beneficiary's foreign degree and its equivalency to a degree, if any, issued by a United States accredited university.

The director shall make a determination on the beneficiary's qualifications only after rendering a decision on whether or not the position qualifies as a specialty occupation. If the director determines that the position does not qualify as a specialty occupation, the beneficiary's qualifications would not be relevant to the outcome of the proceedings, and need not be addressed.

Accordingly, as the director's decision does not adequately address the merits of the petition, this matter is remanded for the director to render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. The director should issue a request for additional evidence and must afford the petitioner a reasonable amount of time to provide the requested evidence. If the new decision is adverse to the petitioner, the director shall certify it to the AAO for review.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's January 14, 2004 decision is withdrawn. The petition is remanded to the director for entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.