

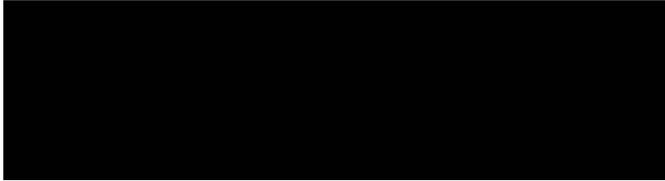
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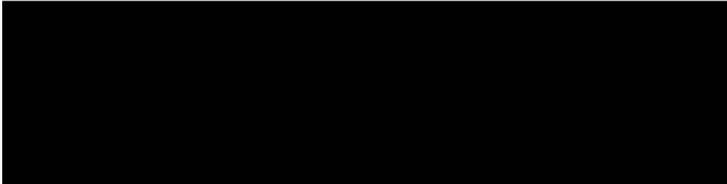


FILE: WAC 07 148 50523 Office: CALIFORNIA SERVICE CENTER Date: DEC 08 2008

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)

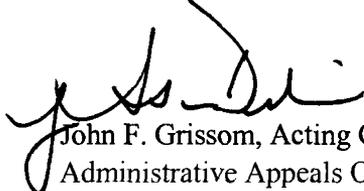
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom, Acting 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 real estate management services business that seeks to employ the beneficiary as a part-time business 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, determining that the petitioner had not established that a credible offer of employment exists or that the beneficiary is qualified to perform the duties of a specialty occupation.

It is noted that, in a separate decision, the director also found the beneficiary ineligible for a change of nonimmigrant status or an extension of stay because she had violated her H-3 nonimmigrant status. Counsel addresses these additional issues on appeal. Pursuant to 8 C.F.R. § 248.3(g), however, there is no provision for an appeal from the denial of a change of status. Furthermore, pursuant to 8 C.F.R. § 214.1(c)(5), there is no provision for an appeal from the denial of an application for extension of stay filed on Form I-129 or I-539. As this office does not have jurisdiction over the director's decision regarding the beneficiary's request for a change of status and for an extension of stay, these issues will not be reviewed.

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) the petitioner and counsel's responses to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 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.

In a March 29, 2007 letter submitted in support of the petition, counsel asserts that the proffered business analyst position combines the duties of a market and survey researcher and a financial manager, as described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*.

In an April 1, 2007 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered part-time business analyst position as follows:

Financial Control and Monitoring – 50%

- Analyze financial documents including income tax returns, profit and loss, balance sheets, and general ledgers to gain information on each property's distribution of cost, problems with cost control, expense reconciliation, variances in budget, and treatment of variances;
- Input data in spreadsheets to recognize trends, review actual versus projected income versus revenue, and monitor significant expenditures against budgets;
- Analyze current accounting practices including budget systems, cost systems, payable/receivable systems, inventory control, etc. and determine the effectiveness and efficiency of [the petitioner's] procedures;
- Examine business transactions, focusing on tenant history and payment schedules;
- Review property management reports and leasing reports including supplementary schedules and leasing status; and
- Perform variance analysis and identify areas where improvement is needed.

Organizational Analysis – 50%

- Develop economic analysis to define and analyze strategy to assess pricing models and market efficiency;
 - Increase the capability of [the petitioner’s] organization to achieve its goal through the identification, delivery, and application of “a carefully formulated strategic organizational development plans”;
 - Develop and continuously improve the management and leadership competencies of [the petitioner’s] workforce;
 - Develop and implement cost-effective plans that will not sacrifice [the petitioner’s] high standards of service;
 - Analyze and assess [the petitioner’s] strength and deficiencies and formulate resolutions/modifications to improve on [the petitioner’s] processes;
 - Outline [the petitioner’s] specific strategic vulnerabilities [to protect against] potential threats;
 - Focus on both critical success factors as well as failure factors in order to identify patterns;
- Outline different types of organizational structures and conditions under which changes in services are more likely to succeed;
- Address findings and knowledge gained from financial data and organizational analysis to recommend changes to the systems; and
 - Support price increases and decreases and changes in equipment.

In an RFE, the director requested additional information from the petitioner, including wage information, bank statements, a more detailed job description, and evidence of the beneficiary’s valid nonimmigrant status.

In response to the RFE, counsel submitted additional information, including an August 17, 2007 letter from the petitioner’s COO, who added the following duties to the previously described duties:

Financial Control and Monitoring – 50%

- Assemble spread sheets and draw charts and graphs used to illustrate technical reports;
- Evaluate and compare the relative quality of various properties’ financial data;

- Interpret data affecting investment programs, such as price, yield, stability, future trends in investment risks, and economic influences;
- Maintain knowledge and stay abreast of developments through the analysis of information obtained from financial publications and services, investment banking firms, government agencies, trade publications, company sources, and personal interviews;
- Prepare plans of action for investment based on financial analyses;
- Present oral and written reports on general economic trends, individual corporations, and entire industries;
- Recommend investments and investment timing; and
- Determine the optimal prices at which properties should be obtained or sold.

Organizational Analysis – 50%

- Determine the [petitioner's] financial stability and strength in the markets' purchasing/investment power;
- Inform managers and leaders of news and trends;
- Determine the balance of [the petitioner's] properties portfolio and alert managers immediately if the portfolio is too focused (in terms of region, price range, short/long-term, monetary, etc.);
- Review audit reports of internal and external auditors in order to monitor adequacy of scope of reports or to discover specific weaknesses in internal routines;
- Review balance sheets, operating income and expense accounts, and loan documentation in order to confirm institution assets and liabilities;
- Verify and inspect cash reserves, assigned collateral, and other liquid and non-liquid resources;
- Confer with managers on [the petitioner's] goals and expectations and help make achievable and profitable targets; and
- Consider the relative costs and benefits of potential actions to choose the more appropriate option.

The AAO notes that in this second list of job responsibilities, the petitioner has expanded the Financial Control and Monitoring duties from primarily property management related duties to include more complex investment-related activities. The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When

responding to a request for evidence, a petitioner cannot materially change a position's title, its associated job responsibilities, or its level of authority within an organizational hierarchy. A petitioner may also not change the proffered position in material ways at the time of the appeal. CIS may not approve a petition if the facts that existed when the petition was filed have materially changed. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978). The regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12).

The director denied the petition on the basis of her determination that the petitioner had neither the financial nor organizational scope, nor the complexity to utilize the beneficiary in the capacity of financial manager. Therefore, there was no evidence to establish a credible employment offer exists.

On appeal, counsel states, in part, that the proffered part-time business analyst position combines the duties of a market researcher and a financial manager, and that the petitioner's operations, which entail providing services related to investment, development, property management, asset management, brokerage, sales, acquisitions, and leasing, are significantly more complex and varied than property purchasing alone. Counsel also states that the petitioner's "current business ventures in the volatile California and Las Vegas markets only underscore the need for careful risk assessment and strategic planning." As supporting documentation, counsel submits: copies of previously submitted documents; a letter from the petitioner; and the petitioner's 2006 federal income tax return.

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 DOL's *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. The AAO does not concur with counsel that the proffered position is that of a financial manager, an occupation that would normally require a bachelor's degree in finance, accounting, economics, or business administration. In its *Handbook*, 2008-09 edition, the DOL describes the job of a financial manager, in part, as follows:

Controllers direct the preparation of financial reports, such as income tax statements, balance sheets, and analyses of future earnings or expenses, that summarize and forecast the organization's financial position. Controllers also are in charge of preparing special reports

required by regulatory authorities. Often, controllers oversee the accounting, audit, and budget departments.

Financial managers play an increasingly important role in mergers and consolidations and in global expansion and related financing. These areas require extensive, specialized knowledge to reduce risks and maximize profit. Financial managers increasingly are hired on a temporary basis to advise senior managers on these and other matters. In fact, some small firms contract out all their accounting and financial functions to companies that provide such services.

The role of the financial manager, particularly in business, is changing in response to technological advances that have significantly reduced the amount of time it takes to produce financial reports. Financial managers now perform more data analysis and use it to offer senior managers ideas on how to maximize profits. They often work on teams, acting as business advisors to top management.

According to the information on the petition, the petitioner is a real estate management services business with 41 employees. The petitioner's 2006 federal income tax return reflects gross receipts or sales of \$2,659,347.00, no compensation of officers paid, no salaries and wages paid, and \$786,250.00 paid in commissions. The petitioner has not demonstrated that it will employ the services of a financial manager/controller, who is part of an executive decision-making team. Further, there is no evidence that the position offered includes complex or advanced financial planning duties involving mergers and consolidations, global expansion and financing, or that the position requires an individual with a knowledge of sophisticated financial planning techniques normally associated with the duties of a financial manager. Moreover, the record contains insufficient evidence to support counsel's claim on appeal that the petitioner provides a variety of services related to investment, development, property management, asset management, brokerage, sales, acquisitions, and leasing, which are so complex as to require a degreed professional financial manager/controller.

In addition, a review of the Market and Survey Researchers category in the *Handbook* finds no requirement of a bachelor's degree in a specific specialty for a market researcher position. While the *Handbook* indicates that a bachelor's degree is usually sufficient for entry-level market research positions, it also indicates that a wide variety of courses will prepare a person to perform the duties of a market researcher. The petitioner did not provide a description of duties in a market researcher-related field that would require a master's degree, as described in the *Handbook*. Moreover, the record contains no evidence to support the petitioner's claim of 41 current employees on the petition that was filed on April 2, 2007. It is noted that the petitioner's quarterly wage and withholding report for the last quarter of 2006 reflects 31 employees for the first two months and 30 employees for the last month of the quarter. 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, however, 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).

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for financial analyst and related positions. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. The staffing and insurance businesses are not similar to the petitioner's real estate management services business. Neither do these listings indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Moreover, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as those duties described for the advertised positions, such as serving as a senior financial analyst for a corporate accounting team, and collaborating with the business units of a leading commercial property-casualty insurance provider. The record also does not include any evidence 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 submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. 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. The evidence of record indicates that the proffered position is a new position. Therefore, the evidence of record does not establish this criterion. In addition, the AAO observes that the petitioner's desire to employ an individual with a bachelor's degree or equivalent does not establish that the position is a specialty occupation. 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 non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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.

On appeal, counsel states, in part, that “due to the petitioner's unique business needs, the company requires an in-house market researcher to obtain and analyze data beyond the scope of data found in standard real estate reports and surveys.” 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, or its equivalent, in a specific specialty. Further, as indicated earlier in this decision, the petitioner's unsupported claims regarding the basic information of its business do not establish a requirement for the level of knowledge requisite for this criterion. 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).

Upon review of the totality of the record, the record fails to reveal sufficient evidence that the offered position requires a bachelor's degree, or its equivalent, in a specific discipline. Accordingly, it is concluded that the petitioner has not demonstrated that the offered 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).

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The director also found that the beneficiary's U.S. equivalent of a bachelor's degree in business administration does not qualify her for a specialty occupation, as her coursework does not contain any classes in finance. On appeal, counsel states that the beneficiary is qualified to work as a business analyst because she holds a bachelor's degree in business administration with a major in management. Counsel also states that the beneficiary completed many classes related to finance. As supporting documentation, counsel submits a copy of the beneficiary's transcript.

The record contains the following documentation pertaining to the beneficiary's qualifications:

- A copy of the beneficiary's Bachelor of Science degree in Business Administration, dated March 19, 2000, from Santa Isabel College in the Philippines, and corresponding transcript; and
- An evaluation report dated May 30, 2006, from the Foundation for International Services, Inc., concluding that the beneficiary's foreign bachelor's degree is the equivalent of a bachelor's degree in business administration with a specialization in management from a regionally accredited college or university in the United States.

In this matter, the nature of the proffered position is unclear. As such, the AAO is unable to determine the qualifications necessary to perform the duties of the proffered position. As discussed above, the AAO does not find that the proffered position is that of a financial manager, an occupation that would normally require a bachelor's degree in finance, accounting, economics, or business administration. *See the Handbook, 2008-09 edition.* In addition, a review of the Market and Survey Researchers category in the *Handbook* finds no requirement of a bachelor's degree in a specific specialty for a market researcher position.

Although the petitioner provides a general description of the proposed part-time business analyst duties in its April 1, 2007 and August 17, 2007 letters, it is not clear that the beneficiary would perform complex duties in relation to investment, development, property management, asset management, brokerage, sales, acquisitions, and leasing, as asserted by counsel on appeal. As discussed above, the record contains insufficient evidence in support of the assertions by counsel and the petitioner. It is noted that the petitioner's business activity is described in its 2006 federal income tax return as real estate management. Without evidence that the proffered position entails the duties described by the petitioner and counsel, such as "interpret[ing] complex data affecting investment programs," it cannot be determined whether the proffered position requires a related bachelor's degree.

The evaluator in the academic credential evaluation report concluded that the beneficiary holds the equivalent of a bachelor's degree in business administration with a specialization in management from a regionally accredited college or university in the United States. A degree in business administration alone, however, is insufficient to qualify the beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. The beneficiary's coursework must indicate that he or she obtained knowledge of the particular occupation in which he or she will be employed. *Matter of Ling*, 13 I&N Dec. 35 (Reg. Comm. 1968). Again, without a detailed description of the beneficiary's actual daily duties in relation to the petitioner's specific business operations, as discussed above, it cannot be determined that the beneficiary's educational background qualifies her for the proffered position.

In view of the foregoing, the petitioner has not submitted argument or documentation on appeal sufficient to overcome the director's decision on this issue. The petitioner has not established that the beneficiary has the requisite qualifications to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

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.