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FILE: EAC 07 134 52591 Office: VERMONT SERVICE CENTER Date: **NOV 10 2008**

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

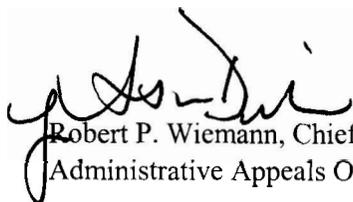
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[REDACTED]

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 a start-up telecommunications services company that seeks to employ the beneficiary as a chief executive officer (CEO)/business developer. 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 proffered position is 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) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's statement 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.

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 the petitioner's CEO/business developer. Evidence of the beneficiary's duties includes: the petitioner's March 22, 2007 letter in support of the petition and the petitioner's June 15, 2007 response to the director's RFE. As stated by the petitioner, the proposed duties are as follows:

1. Oversee the general management of the business;
2. Make staffing decisions including the hiring and firing of personnel and issues pertaining to salary;
3. Render decisions on business commitments and contracts with clients;
4. Provide information to potential U.S. clients;
5. Create the petitioner's business and operational plan;
6. Meet with potential clients, and render decisions on business commitments and contracts;
7. Oversee the petitioner's sales and marketing strategy and advertising campaign;
8. Coordinate domestic and overseas activities with the petitioner's subsidiary company in Israel;
9. Identify, structure, negotiate and close opportunities for potential clients and partners;
10. Analyze strategies, products, pricing, distribution channels, and promotion efforts;

11. Supervise and coordinate pre-sales and post-sales activities;
12. Supervise and coordinate the marketing and sale of the petitioner's products;
13. Represent the petitioner in media and press gatherings and review press releases;
14. Establish a budget system and budget monetary system; and
15. Advise the Board of Directors regarding a strategic direction for technology development and the adaptation of products to market demands.

The director found that the proposed CEO duties do not require a bachelor's degree 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 that the proffered position qualifies as a specialty occupation. Counsel also states that, even though the petitioner was incorporated in 2004, its operations in the United States "are just now starting in full gear" and the petitioner expects to hire up to 35 employees during 2007 and 2008. As supporting documentation, counsel submits: a professional position evaluation report; a letter from a similar business; and the petitioner's business plan.

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 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. Although a review of the *Handbook*, 2008-09 edition, finds that, in some instances, a top executive position may qualify as a specialty occupation, the AAO does not concur with counsel that the proffered position is a specialty occupation. Counsel's assertions on appeal that, even though the petitioner was incorporated in 2004, its operations in the United States "are just now starting in full gear" and the petitioner expects to hire up to 35 employees during 2007 and 2008, are noted. There is no documentation of record, however, that current operations are underway. The record does not contain any evidence that the

petitioner's U.S. operations "are just now starting in full gear." Nor does the record contain sufficient evidence that the duties the beneficiary would perform as a result of these operations would require the theoretical and practical application of at least a bachelor's degree 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). In view of the foregoing, the proposed duties do not comprise a position that meets the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, one for which the normal minimum entry requirement is at least a bachelor's degree, or the equivalent, in a specific specialty.

The record also contains an industry standard letter from a telecommunications business, whose writer asserts, in part, that the proffered position requires post-secondary education and that without a degree, an executive would not be able to properly execute the responsibilities of a CEO. The writer, however, does not stipulate a bachelor's degree in a specific specialty. Nor does he provide sufficient evidence in support of his assertions or rely on industry surveys, data or other documentation to establish that the position requires a bachelor's degree in a specific specialty. In addition, the writer has not established that his business is similar to the petitioner in size, number of employees, or level of revenue, as he asserts that his business currently employs 120 employees. 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)). The *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, and indicates that, in some instances, a top executive position may qualify as a specialty occupation. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The opinion rendered by the professor is not probative. First, the evidence of record does not establish that the professor is an expert in the area in which he is opining. Despite his self-endorsement, neither the professor's letter, his resume, nor any other evidence of record substantiates that he is qualified as an expert on industry-wide recruiting and hiring practices regarding top executives/business developers. Second, the opinion is based upon insufficient information about the particular position proposed here. The professor describes the duties in exclusively general and generic terms that reveal nothing about the actual work that the beneficiary would perform within the context of this particular petitioner's business. The professor does not demonstrate knowledge of the petitioner's particular business operations. He does not relate any personal observations of those operations or of the work that the beneficiary would perform, nor does he state that he has reviewed any projects or work products related to the proffered position. Third, the professor's opinion does not relate his conclusions to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for his conclusions about the educational requirements for the particular position here at issue. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable,

CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The record contains insufficient evidence regarding parallel positions in the petitioner's industry or 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 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. As the petitioning entity is a start-up business, the petitioner has not established this criterion. Moreover, 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 the 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 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).

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.