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U.S. Citizenship
and Immigration
Services

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MAR 30 2005

FILE: WAC 04 021 51482 Office: CALIFORNIA SERVICE CENTER Date:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 firm with 17 employees. It seeks to hire the beneficiary as an office manager and a market research analyst. The director denied the petition based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) 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 petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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) 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 states that it is seeking the beneficiary’s services as an office manager and a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; an October 23, 2003 letter from the petitioner regarding its intent to employ the beneficiary; and counsel’s November 17, 2003 response to the director’s request for evidence, including a position description provided by the petitioner and copies of classified job advertisements for the proffered position.

At the time of filing, the petitioner’s Form I-129 stated it was seeking an office manager to oversee its office operations, create promotions and advertising programs, supervise accounting and tax preparation, and hire, train, and supervise support staff. In its October 23, 2003 letter of intent, it described an administrative workload that had grown to a point where it required a full-time office manager with solid business administration and management education and work experience. This same general description of the petitioner’s employment was echoed in the classified job advertisements for the proffered position. These advertisements stated the position would require applicants to: develop advertising and promotions for the real estate office and branches; direct preparation of accounting records and tax filings; hire, train and supervise support staff; and conduct staff meetings to discuss changes in policy and procedures.

However, in his November 17, 2003 response to the director’s request for evidence, counsel described significantly different employment, characterizing the petitioner’s position as a “two-fold” job that combined the duties of office manager and market analyst. Accompanying this description was a separate listing of the position’s duties that not only failed to support counsel’s statements, but also differed significantly from the range of duties identified by the petitioner at the time of filing. Moving away from its earlier description of the position as that of an office manager with responsibility for supervising support staff, the petitioner now stated the beneficiary would:

- Direct and coordinate activities of sales staff;
- Screen and hire sales agents;
- Conduct training sessions to present and discuss sales techniques, ethics;
- Accompany sales agents and clients to observe sales methods utilized, and counsel agents regarding matters, such as professionalism, financing, and sales closings;

- Confer with agents and clients to resolve problems, such as adjusting sales prices, repairing property, or accepting closing costs;
- Confer, as necessary, with legal authority to determine if transactions are handled in accordance with state laws and with regulations;
- Review, if asked, agents' transactions and paper work to check for errors and omissions; and
- Oversee marketing/advertising copy of agents to ensure compliance with fair housing laws and ethical standards.

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). Therefore, when responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). However, both job descriptions provided in response to the director's request for evidence -- counsel's two-fold employment of the beneficiary as both office manager and market analyst, and the petitioner's transformation of its position into that of a business manager -- materially alter the employment described by the petitioner at the time of filing. As a result, the AAO will accept neither of these descriptions as evidence of the proffered position's duties. Instead, it will analyze only those duties initially described by the petitioner on its Form I-129, in its October 23, 2003 letter of intent and in its classified job advertisements for the proffered position.

On appeal, counsel asserts both that "[a]n important aspect of the position offered was the ability to promote the business of the firm through professional market analysis and advertising to the appropriate demographic that would be most advantageous" and that this aspect of the proffered position was "the main thrust" of the advertising done to attract the beneficiary. However, as already discussed, counsel's statements are not supported by the evidence in the record at the time of filing. The petitioner's description of its position in its Form I-129, in its classified job advertisements, and in its October 23, 2003 letter of intent offer no indication that the beneficiary would perform duties involving market analysis. The AAO notes that both the Form I-129 and the classified job advertisements describe one of the duties of the proffered position as the creation of promotions and advertising programs. However, these advertising duties, as described, cannot be interpreted as requiring the beneficiary to perform market analysis.

Counsel's appeal also states that the director has incorrectly relied on *Matter of Caron International, Inc.*, 19 I&N 791 (Comm. 1988) to support his decision that the proffered position is not a specialty occupation. He contends that the director erred in finding the proffered position to be a general managerial occupation, as discussed in *Matter of Caron*. Instead, counsel asserts that the position is not that of a general manager as the beneficiary would be required to "manage and teach other professionals" who have considerable education and training in the real estate field. However, the duties that counsel states set the proffered position apart from that of a general manager are among those that have been discounted by the AAO. Accordingly, they will not be considered as a basis for distinguishing the proffered position from other managerial employment.

To determine whether the duties described by the petitioner at the time of filing are those of a specialty occupation, the AAO first considers 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

Following its own review of the duties of the proffered position and the 2004-2005 edition of the DOL *Handbook*, the AAO finds the responsibilities associated with the proffered position to fall within no single occupational title. The duties involving office management and supervision of the petitioner's support staff, including those involved in directing the preparation of the petitioner's accounting records and tax filings, appear closely aligned to the occupation of office and administrative support worker supervisors and managers. The *Handbook*, at page 464, describes the work of these supervisors and managers:

All organizations need timely and effective office and administrative support to operate efficiently. Office and administrative support supervisors and managers coordinate this support. These workers are employed in virtually every sector of the economy

Although specific functions of office and administrative support supervisors and managers vary considerably, they share many common duties

Planning the work and supervising the staff are key functions of this job

Office and administrative support supervisors and managers usually interview and evaluate prospective clerical employees

Supervisors help train new employees in organization and office procedures

Office and administrative support supervisors and managers often act as liaisons between the clerical staff and the professional, technical, and managerial staff. This may involve implementing new company policies

However, the position, as described at the time of filing, also includes duties requiring the beneficiary to create promotions and advertising programs for the petitioner. They appear most closely related to the occupation of marketing specialists, which the *Handbook* places within the occupational title of public relations specialists. A discussion of the employment of these specialists is found at page 270 of the *Handbook* and offers the following description:

People who handle publicity for an individual or who direct public relations for a small organization may deal with all aspects of the job. They contact people, plan and research, and prepare materials for distribution. They also may handle advertising or sales promotion work to support marketing

The AAO now turns to the *Handbook* for its discussion of the education and training that may prepare individuals for employment as office and administrative support worker supervisors and managers, and

marketing/public relations specialists. For those seeking employment as a supervisor/manager of office or administrative support workers, the *Handbook*, at page 465, states the following:

Most firms fill office and administrative support supervisory and managerial positions by promoting office or administrative support workers from within their organizations. To become eligible for promotion to a supervisory position, clerical or administrative support workers must prove they are capable of handling additional responsibilities.

For marketing/public relations specialists, the *Handbook*, at page 271, states:

There are no defined standards for entry into a public relations career. A college degree combined with public relations experience usually gained through an internship, is considered excellent preparation for public relations work Many entry-level public relations specialists have a college major in public relations, journalism, advertising, or communication. Some firms seek college graduates who have worked in electronic or print journalism. Other employers seek applicants with demonstrated communication skills and training or experience in a field related to the firm's business

Although the *Handbook* indicates that a college degree may assist individuals in obtaining employment as a marketing or public relations specialist, it clearly states that neither of the above occupations requires those seeking entry-level employment to have a baccalaureate or higher degree, or its equivalent. Accordingly, the AAO concludes that the petitioner cannot establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that the DOL's *Dictionary of Occupational Titles (DOT)*, which assigns a Specific Vocational Preparation (SVP) rating of 8 to the occupation of real estate office manager, establishes a bachelor's degree as the minimum educational requirement for the proffered position. However, the AAO will not consider occupational ratings provided by the *DOT*. The *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only a general discussion of the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Further, the SVP rating of 8 assigned by the *DOT* does not satisfy the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education and experience, and it does not specify the particular type of degree, if any, that a position would require.

To determine whether the petitioner's position meets the second criterion -- that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty-- the AAO has reviewed the five Internet job postings and the description of the "property manager" position at a realty company submitted by counsel in response to the director's request for evidence. However, these materials do not establish that a degree requirement for office managers is the norm within the petitioner's industry.

Of the five Internet announcements, only two identify the company advertising the position and neither of these organizations has operations similar to those of the petitioner. Further, none of the positions advertised

-- four are business or market research jobs and the fifth is that of a sales and marketing manager -- is parallel to the proffered position of officer manager. While the business employing the property manager appears to be in the real estate industry, the position of property manager, as described, is, again, not parallel to the petitioner's proffered position.

With regard to the requirements of the criterion's second prong, the AAO finds nothing in the record to establish that the position is either so complex or unique that it can be performed only by a degreed individual. Accordingly, the petitioner is unable to establish its position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, CIS normally reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. However, as the proffered position is newly created in response to the petitioner's expanded administrative workload, the petitioner cannot establish that it has a history of requiring a degree or its equivalent when filling it. In his response to the director's request for evidence, counsel provided copies of several employment advertisements from a local newspaper. However, these advertisements are for the newly created position of office manager. As a result, they do not establish that the employer has a history of requiring a degree or its equivalent for the position. The AAO notes that these advertisements, as well as the petitioner's October 23, 2003 letter, mention no degree requirement for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that 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. In making its determination, the AAO has again reviewed the duties of the proffered position, as described by the petitioner at the time of filing, to determine whether the position's responsibilities reflect a higher degree of knowledge and skill than would normally be required of an office manager in a real estate firm. While the AAO notes that the position also requires the beneficiary to assume responsibility for certain advertising activities, it does not find that these additional duties, in combination with those of an office manager, reach the specialized and complex threshold of the fourth criterion. While this mix of duties may distinguish the proffered position from other office manager positions, the AAO concludes that the knowledge required to perform them would not normally be associated with a baccalaureate or higher degree.

For reasons related in the preceding discussion, the petitioner has failed to establish that its proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.