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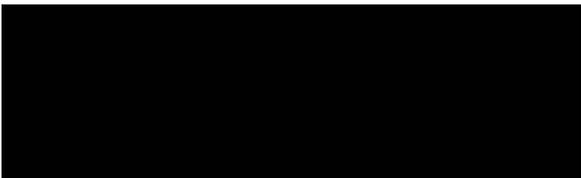
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U.S. Citizenship
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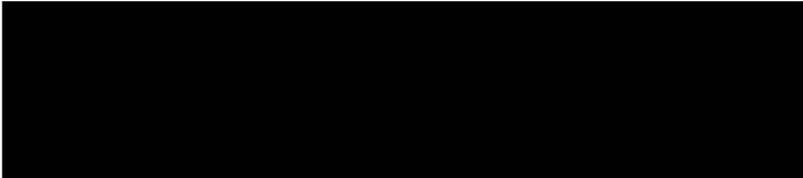


FILE: WAC 07 137 52988 Office: CALIFORNIA SERVICE CENTER Date: **JUN 03 2008**

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 petitioner is a distributor of home linen products that seeks to employ the beneficiary as a market research and business development 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 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 RFE; (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.

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 market research and business development analyst. Evidence of the beneficiary’s duties includes: the petitioner’s March 8, 2007 letter in support of the petition and counsel’s May 2, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

A. Marketing Research Analyst Job Duties (60%):

- Examine and analyze statistical data and reports on the past sales to predict future sales, identify existing and potential product/service markets, and meet customer satisfaction;
- Monitor, research, and report market conditions or changes in the industry for recommendations to management that affect broad-based global company strategy for operational, financial, and human solutions;
- Gather and analyze data on competitors and analyze prices, sales, and methods of marketing and distribution;

- Research and devise methods and procedures for collecting data, including the design of telephone, personal, or mail interview surveys to assess regional consumer product preferences;
- Evaluate product and consumers data and provide recommendations to the general manager for promotion, distribution, design, and pricing of goods and services;
- Manage output of various lead sources in support of marketing strategy for action by the sales function; and
- Provide market research and analysis of potential business development targets.

B. Business Development Analyst Job Duties (40%):

- Attain comprehensive knowledge of the petitioner's marketed products, and competitor and potential competitor products;
- Work with business development department to identify and define market segments and opportunities, address information needs, and develop sales unit volume and forecasts;
- Define study objectives, develop study methodology, design questionnaires to submit to third-party vendors/consultants, manage third-party vendors/consultants, and define/develop sample population;
- Perform and review data analysis (qualitative and quantitative);
- Analyze competitive environment and future trends, and make recommendations in both strategic and tactical directions;
- Quantify market opportunities and threats, and assist in long-range planning and portfolio management;
- Forecast long-term manufacturing needs as well as short-term forecasting and tracking;
- Manage business/market analysis for support of business development and strategy regarding mergers, acquisitions, new products, and facility expansion;
- Develop and present comprehensive product business cases and situational analysis, and implement research plans; and

- Create, conceptualize, and recommend strategies and tactics to executives and managers.

The director found that the proffered position, which is primarily that of a marketing manager, 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 proposed duties, which primarily entail compiling marketing data (50%), analyzing market data (30%), and advising management (20%), are the duties of a market research analyst. Counsel also states that in order to perform the proposed duties and meet the needs of the petitioner, which is a fast-growing company primarily engaged in the sale of home-linen products that are manufactured by its parent company in China, Nanshing Textile, Inc., the petitioner requires an individual with a minimum of a bachelor's degree in marketing, business administration, or a related field. Counsel states further that the petitioner employs the full-time services of a sales manager and sales representatives to perform duties related to advertising, marketing, and sales. Counsel states that the AAO has held in a previous decision that whether a position is professional is unrelated to the company's size. As supporting documentation, counsel submits organizational charts for the petitioner and its parent company, the petitioner's customer list and 2006 federal income tax return, and the petitioner's company profile, product catalogue, and website printout.

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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While a review of the Market and Survey Researchers category in the 2006-07 *Handbook* finds that market research analysts are employed throughout the economy, the AAO does not concur with counsel that the proffered position is a specialty occupation, as the *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for a market research analyst position. While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not provide a description of duties in a market research analyst-related field that would require a master's degree, as described in the *Handbook*. Moreover, although

information on the petition that was signed by the petitioner's CEO on March 8, 2007, reflects that the petitioner was established in 2005, has approximately \$1.5 million in gross receipts or sales, and has 6 employees, the petitioner's 2006 federal income tax return reflects \$1,052,710.00 in gross receipts or sales, and only \$63,995.00 paid in salaries and wages. Of further note, although counsel and the petitioner both assert that the petitioner has retained the services of an individual in the proffered position since its establishment, the record contains no evidence in support of this claim, such as samples of that employee's work, including telephone, personal, or mail interview surveys, study methodologies, questionnaires, qualitative and quantitative data analysis, and strategies regarding mergers, acquisitions, new products, and facility expansion, in accordance with the duties that are generically described in the record. 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 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)). In addition to the foregoing, the petitioner has described the proposed duties in generic terms. The duties described neither relate specific work that the beneficiary would perform, elucidate concrete business matters of this particular petitioner that would be the focus of that work, nor exemplify how performance of that work upon those matters would require the theoretical and practical application of at least a bachelor's level of a highly specialized body of knowledge. Consequently, because the proposed duties are limited to generic terms that do not relate what they involve in actual performance to this specific petitioner's particular business matters, the petitioner has not provided sufficient information to satisfy any of the specialty occupation criteria. Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(I).

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for market research analysts. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. In addition, the construction, manufacturing, retail, dairy, accounting, healthcare, storage, and real estate businesses are not similar to the petitioner's business of distributing home linen products. 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. Thus, the advertisements are insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The AAO notes counsel's reference to a prior AAO decision to state that factors such as the petitioner's size must not be considered. However, the basis of this decision does not rely on the nature or size of the petitioner to conclude that the proffered position does not meet any of the requirements for a specialty occupation; rather the AAO finds that the petitioner has not clearly documented the duties of the position in relation to its business. The complexity of the duties in relation to the petitioner's business must be analyzed. As discussed above, the petitioner has not established that the complexity of the proposed duties requires a baccalaureate degree in the specialty. Again, counsel's assertion on appeal that the proffered position is that of a market research analyst is noted. However, 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. at 165. 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).

Counsel also cites a published decision, *Unical Aviation, Inc. v. INS*, 248 F. Supp. 2d 931 (C.D. Cal. 2002), and asserts that the director's decision violated precedent. In contrast to the broad precedential authority of the case law of a United States circuit court, however, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719. Moreover, the petitioner has failed to establish that the proffered position is analogous to the position discussed in *Unical Aviation, Inc.* The petitioner has recited a description of duties that is similar to the *Handbook's* report on market research analysts and has failed to provide the detail necessary to establish that its position actually incorporates the general duties described. For example, when discussing an occupational title such as a market research analyst, the petitioner cannot repeat portions of the generalized descriptions found in the *Handbook*. Such a generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. In the instant matter, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. It has not detailed the actual work to be performed for this position rather than describing the occupation.

The record does not include any evidence 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 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. On appeal, counsel states: “The petitioner has retained the service of the proffered position since its establishment, as showed [sic] by its organizational chart submitted in the Exhibits.” In this matter, the petitioner has not provided this information for review. Moreover, the critical element is not the title of the position or the 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. Although the petitioner indicates it has “retained the service of the proffered position since its establishment,” the record does not contain evidence of the educational backgrounds of the employees who have held the proffered position. 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). Further, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. The AAO reviews the petitioner's past employment practices as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas to aid in determining the third criterion. 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 menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements that would require the beneficiary to have a unique set of skills attained through study at a bachelor's degree level in a specific discipline. The petitioner has not submitted evidence of specific specialized duties that pertain to its particular business. Without a meaningful list of duties related to its specific business operations, the petitioner has not established that the generally described duties are either specialized or complex. 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.

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.