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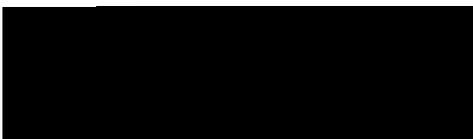
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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FILE: EAC 06 145 52027 Office: TEXAS SERVICE CENTER Date: **APR 03 2009**

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.

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 or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. 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 home furnishings design wholesaler. It seeks to extend the employment of the beneficiary as a product cost analyst 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 failed to establish that the proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 with supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel for the petitioner's response to the director's RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing 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.

United States Citizenship and Immigration Services (USCIS) 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 seeks the beneficiary's services as a product cost analyst. Evidence of the beneficiary's duties includes the petitioner's March 28, 2006 letter in support of the petition. The petitioner outlined the job duties of the proffered position as including, but not limited to the following:

- Work in coordination with Product Development Department to obtain factory price quotes for all items developed and produced by the Company.
- Analyze and compare all products, prices, and development considerations against historical and current data to develop wholesale costs and customer price quotations.
- Document and maintain all costing/pricing files and records.
- Responsible for complete and accurate computer documentation of all entries and changes made to the Product Management, Presentation, Customer and Product Development Screens in Frame Master.
- Analyze wholesale costs taking into account factors, such as freight, duty, quota, MOQ's, agents and sales commissions, house loads, desired level of EL margin, warehouse expenses if required to carry domestic inventory.
- Maintain and control profit margin of the Company.
- Review price quotes and work up the document first base costs and retails in accordance with the established EL file system and procedures.

The petitioner claimed that to perform the above-stated duties, a qualified candidate must possess at a minimum a bachelor's degree in business, finance, or a related field.

On July 22, 2006, the director requested evidence to substantiate the claim that the proffered position was a specialty occupation. In response, former counsel addressed the director's claims, and submitted a letter from the petitioner outlining the duties of the proffered position in greater detail. The petitioner also submitted an excerpt from the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on cost estimators.

The director denied the petition, finding that the proffered position was not a specialty occupation. Specifically, the director found that, while the proffered position did in fact appear to be akin to that of the

Handbook's description of cost estimator, it also noted that the *Handbook* did not require a degree in a specific field in order to perform the duties of the position. Furthermore, the director focused closely on the petitioner's updated description of the beneficiary's proposed duties, and noted that tasks such as the analyzing of cost effectiveness of items such as fashion photo frames and tabletop accessories did not appear to be tasks associated with a specialty occupation.

On appeal, counsel for the petitioner asserts that a cost estimator is a professional position and takes issue with the director's interpretation of the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) report on cost estimators. Counsel submits a lengthy brief in which he asserts that the proffered position, while similar to that of a cost estimator as defined by the *Handbook*, also embodies many of the duties and qualifications of positions such as financial analysts, marketing managers, purchasing managers, and financial managers. Counsel proceeds to equate these positions, as described by the *Handbook*, as akin to that of the proffered position, and therefore concludes that the beneficiary's position of product cost analyst would therefore be a specialty occupation. The AAO disagrees.

Preliminarily, the AAO notes that in response to the request for evidence, former counsel for the petitioner submitted excerpts from the *Handbook's* overview of the position of cost estimator, and urged the director to conclude that the proffered position was a specialty occupation based on the duties and educational qualifications stated therein. On appeal, newly-retained counsel for the petitioner attempts to change the nature and title of the proffered position to an amalgam of positions; namely, financial analyst, marketing manager, purchasing manager, and financial manager. These claims will not be considered by the AAO. On appeal, 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 the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

USCIS 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. In the denial, the director observed that according to the *Handbook*, there was no specific degree requirement for a cost estimator. Based on this factor, coupled with a review of the specific duties of the proffered position combined with the nature of the petitioning entity's business operations, the director determined that the stated tasks did not correlate with those of a specialty occupation. Upon review of the record, the petitioner has failed to establish that the proffered position meets any of the criteria of a specialty occupation.

Turning to the first criterion, whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, the AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations.

The 2006-2007 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, an excerpt of which was submitted by the petitioner in response to the request for evidence in support of the contention that the proffered position was akin to that of a cost estimator, indicates: "[c]ost estimators develop the cost information that business owners or managers need to make a bid for a contract or to decide whether a proposed new product will be profitable." The *Handbook* states further:

Regardless of the industry in which they work, estimators compile and analyze data on all of the factors that can influence costs—such as materials, labor, location, and specialty machinery requirements, including computer hardware and software. Job duties vary widely depending on the type and size of the project.

The petitioner's general description of the duties of the proffered position corresponds to the *Handbook's* general discussion regarding cost estimators. The director found that the *Handbook* reports that employers prefer but do not require applicants with bachelor's degrees for the position of cost estimator.

The *Handbook*, although noting an increasing preference for degrees in construction, engineering, or architecture, does not indicate that employers require a degree in a specific discipline to perform the duties of the proffered position. Employer preference is not synonymous with the "normally required" language of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the AAO concurs with the director's conclusion that the *Handbook* does not indicate that a bachelor's or higher degree is required for the occupation of a cost estimator.

The AAO next considers whether a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the petitioner's particular position is so complex or unique that it can be performed only by an individual with a degree, as required by the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The AAO notes that the petitioner has failed to submit any evidence, such as job announcements for similar positions available in other companies similar to the petitioner in size, number of employees, or level of business.

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. The general description of the duties of the position of product cost analyst does not exceed the scope of a typical cost estimator, a position that does not require a bachelor's degree in a specific discipline. The AAO does not find that the petitioner has provided evidence of particularly complex or unique duties that would elevate the proffered position to one that only an individual with a degree in a specific discipline could perform.

A review of the evidence of record finds it insufficient to establish that the proposed duties comprise a position that is identifiable with an industry-wide educational standard requiring a degree in a specific discipline, or distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. 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 next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), whether the employer normally requires a degree or its equivalent for the position. The AAO usually 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 assist in making this determination. In this matter, the petitioner has not provided evidence that it previously employed anyone in this position. However, the petitioner has provided a letter signed by its general counsel dated November 2, 2006, wherein it claims that while the position of cost analyst has never been permanently filled, the previous employees who worked in the position all held bachelor's degrees in relevant disciplines. The letter from the petitioner, however, absent additional evidence such as payroll records or evidence of degrees, is insufficient to satisfy this requirement. 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)). Therefore, the petitioner has not established the proffered position is a specialty occupation pursuant to the requirements of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether 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. The AAO acknowledges counsel's iteration of the beneficiary's duties on appeal and assertion that the duties are complex. The AAO, however, finds that counsel's discussion of the beneficiary's duties corresponds generally to that of a cost estimator; the duties described are routine and do not contain a specialized element or component that elevates the position to one that requires a bachelor's degree in a specific discipline. Neither counsel nor the petitioner have described complex projects, represented that the nature of the position requires the beneficiary to have a unique set of skills beyond those of a general cost estimator, or otherwise described duties that are specialized or complex. The petitioner has not established that the proffered position is a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Upon review of the record, including the additional information and assertions submitted on appeal, the petitioner has not established 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. Accordingly, the previous decision of the AAO will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed. The petition is denied.