

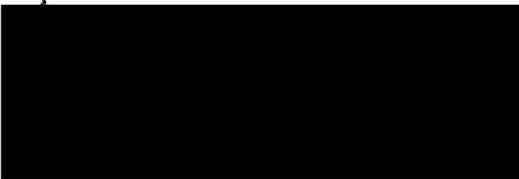
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U.S. Citizenship
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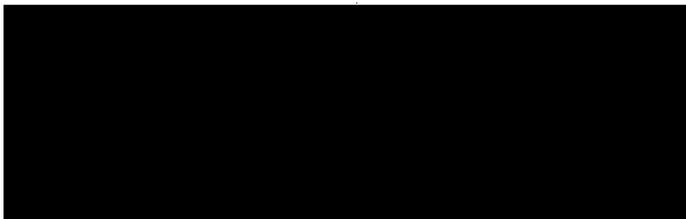


FILE: WAC 04 195 50269 Office: CALIFORNIA SERVICE CENTER Date: **AUG 11 2008**

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director 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 residential care facility for the elderly that seeks to extend its employment of the beneficiary as a financial analyst. The petitioner 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. On appeal, counsel submits a brief.

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.

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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a financial analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's June 7, 2004 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing the petitioner's current financial status; developing a financial plan based on analysis of data; analyzing records of present and past operations, trends and costs, estimated and realized revenues, administration commitments, and obligations incurred to project future revenues and expenses; preparing and submitting documents to implement selected plans; advising management on matters such as the effective use of resources and assumptions underlying budget forecasts; estimating future revenues and expenditures based on analysis of financial statement and data; interpreting data affecting investment programs; developing plans of action for investment; and discussing financial options with management and recommending investments. The petitioner stated that a qualified candidate for the job would possess a bachelor's degree or its equivalent in a financially-related field.

The director found that the proffered position was not a specialty occupation because the petitioner's industry is not of a type that typically employs financial analysts, and because the duties of the proffered job differ from those typically performed by a financial analyst. The director found further 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 CIS violated its own regulations by not giving deference to the fact that the petition is an extension of a petition that had been approved previously. Counsel also states that since the petitioner has already employed the beneficiary for two years and has required her to possess a bachelor's degree, that the petitioner has met the terms of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). Counsel asserts that the director was unreasonably restrictive in his assessment of the types of industries that employ financial analysts. Counsel further asserts that the director's determination that some of the duties of the proffered position are those described by the Department of Labor's *Occupational Outlook Handbook (Handbook)* for financial analysts and his further determination that the information in the *Handbook* establishes the position as a specialty occupation conflict with his later determination that the proffered position is not a specialty occupation. Counsel states that the petitioner has met all four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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. The AAO does not concur with the director and counsel that the proffered position is that of a financial analyst, as described in the *Handbook*. Financial analysts study companies to determine the investment decisions that should be made by their employers. The proffered position does not encompass any of the duties of a financial analyst as described in the *Handbook*. The petitioner provided no evidence that it engages in any type of investment activities.

The duties as described in the petitioner's letter of support appear to be primarily those of a budget analyst, as described in the *Handbook*. The *Handbook* indicates that the occupation does not require a degree in a specific specialty. While the AAO notes the generic degree requirement, as discussed in the 2006-2007 edition of the *Handbook*:

Private firms...generally require candidates for budget analyst positions to have at least a bachelor's degree.... Sometimes, a degree in a field closely related to that of the employing industry or organization, such as engineering, may be preferred. Some firms prefer candidates with a degree in business because business courses emphasize quantitative and analytical skills.

On appeal, counsel asserts that the director determined that a position as a financial analyst is a specialty occupation, but inappropriately denied the petition based on the petitioner's size and industry. Counsel further asserts that the petitioner "continues to grow which justifies a full-time Financial Analyst position." While the AAO concurs that the size of a business does not preclude it from hiring any type of professional, the petitioner must still establish that it will employ the beneficiary in a specialty occupation. It is noted that the petitioner lists the following duties for the position: interpreting data affecting investment programs; developing plans of action for investment, and discussing financial options with management and recommending investments. Nevertheless, the petitioner has not submitted any corroborating evidence that it has an investment program, or that it has funds to invest. The petitioner's tax return for 2002 lists net income of \$44,743; its 2003 tax return reflects a net loss of \$33,406. 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, there is no evidence in the record to establish that the petitioner is expanding, either in terms of its business plans, or its income. The petitioner's tax returns, submitted in response to the director's request for evidence, indicate that while the petitioner's gross receipts increased from approximately \$743,000 in 2002 to \$820,000 in 2003, its profits and total income decreased by \$100,000, leaving the petitioner with a net loss in 2003. The petitioner indicates that it employs six workers and seven contract employees. There is no evidence in the record to establish the level of complexity of the petitioner's financial operations and that a degree in a specialty is required to perform the duties of a budget analyst for the petitioner. As noted

above, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*.

When a job, like that of budget analyst, can be performed by a range of degrees or a degree of generalized title without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As already noted, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(A) to require a degree in a specific specialty that is directly related to the proffered position.

As the *Handbook* clearly indicates that the position of budget analyst does not require a degree in a specific specialty, the AAO concludes that the proffered position does not qualify as a specialty occupation under the first criterion – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To determine whether the petitioner can establish that its 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 Internet job postings submitted by counsel in response to the director's request for evidence, the letter from another operator in the petitioner's industry and considered counsel's assertions on appeal that the *Handbook* provides evidence of the degree as an industry norm.

The job listings submitted by counsel do not, however, provide proof that businesses similar to the petitioner's and with parallel positions require the services of individuals with baccalaureate degrees. After reviewing these job announcements, the AAO finds that they reflect the employment needs of several organizations with operations dissimilar to the petitioner's business and either do not provide enough detail to determine whether the positions advertised are parallel to that described by the petitioner, or clearly describe positions that are not parallel to the petitioner's.

As interpreted by CIS, the second criterion requires a petitioner to establish that a degree in a specific specialty directly related to the proffered position is common to its industry. As indicated above, the *Handbook* does not establish that a degree in a specific field is required to perform the duties of a budget analyst. Thus, the *Handbook* does not provide evidence of a specific degree as an industry norm. The letter submitted from another operator of homes for the elderly states that it requires a bachelor's degree in commerce or finance for the position of financial analyst, but provides no evidence to substantiate its statement. As previously noted, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*. The petitioner provided no evidence to establish that the proffered position is so complex or unique that it can be performed only by an individual with a bachelor's degree in the specific specialty. The petitioner has not met the criterion 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 knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, the AAO normally 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. Counsel asserts that since the current petition is an extension of a previously approved petition, the petitioner has established that it requires a bachelor's degree for the position by virtue of its employment of the beneficiary in the position. While the AAO acknowledges that the petitioner has clearly stated its desire to hire a financial analyst with the beneficiary's qualifications, the AAO notes that it is not the petitioner's self-described employment needs that dictate whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). That determination can only be made through the application of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree.

The fourth criterion requires the petitioner to establish that the nature of the proffered position's 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 in the specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has reviewed the duties of the proffered position as described by the petitioner in its June 7, 2004 letter, as well as counsel's response to the director's request for evidence and his discussion of this criterion on appeal.

The AAO does not find the petitioner's general description of the duties of a financial analyst in the response to the director's request for evidence and on appeal to be persuasive. Neither the specific duties described by the petitioner, nor the more generic description subsequently provided by counsel lead the AAO to conclude that they are more specialized or complex than those associated with the occupation of budget analyst as described in the *Handbook*. Having found the petitioner's position to involve no duties that differentiate it from that of the budget analyst position described in the *Handbook*, which does not require a degree in a specific field, the AAO concludes that the petitioner has failed to meet the requirements of the fourth and final criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Regarding counsel's argument that CIS violated its own regulations in not giving deference to the prior approval of the proffered position as a specialty occupation, the director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported and contradictory assertions that are contained in the

current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The prior approval does not preclude CIS from denying an extension of the original visa based on reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

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.