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FILE: WAC 03 012 51932 Office: CALIFORNIA SERVICE CENTER Date: JAN 24 2006

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 blue ink, appearing to read "Robert P. Wiemann".

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 an importer, wholesaler and converter of textiles that seeks to hire the beneficiary as a budget analyst. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation. On appeal, counsel submits a brief and additional documentation.

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 supporting evidence. The AAO reviewed the record in its entirety before reaching its decision.

The initial issue before the AAO is the determination of whether the petitioner's 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 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 a budget analyst. Evidence of the beneficiary's duties includes: the Form I-129; the August 12, 2002 support letter from the petitioner accompanying the Form I-129; and counsel's response to the director's request for evidence.

The petitioner has stated that its proffered position must be filled by an individual who will be able to develop, analyze and execute the budgets, which will be used to allocate current resources and estimate future requirements. Specifically, the position will require the beneficiary to:

- Review and regulate expenditures and capital spent;
- Analyze and seek new ways to improve efficiency and increase profits;
- Prepare monthly, quarterly and annual budget;
- Examine the budget estimates for completeness, accuracy and conformance with established procedures, regulations and organizational objectives;
- Examine past and current budgets;
- Research economic and financial developments that affect the organization's spending;
- Consolidate budgets and submit summaries containing statements that support or argue against funding requests;
- Submit the proposed plan to management;
- Periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified;
- Prepare reports explaining the variations along with recommendations for new or revised budget procedures;
- Participate in long-range planning activities, such as projecting future budget needs;
- Estimate future business requirements; and
- Organize and allocate operating and capital resources effectively.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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 *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)).

In his denial, the director stated, "It is clear from the information provided in the [*Handbook*] that the position as a Budget Analyst qualifies as a specialty occupation." He then determined that the petitioner did not establish that the complexity of its business required a budget analyst. The AAO does not concur that the position of budget analyst is a specialty occupation under the first criterion. The *Handbook* indicates that the occupation does not require a degree in a specific specialty. While the AAO concurs that the description of the proffered position is that of budget analyst, we note 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 budget analyst is a specialty occupation, but inappropriately denied the petition based on the petitioner's size and industry. Counsel further asserts that the *Handbook* indicates that all organizations must determine how to efficiently distribute limited financial resources, and that it makes no presumption that a company must be large and complex before it can or should hire a budget analyst. 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 be employing a beneficiary in a specialty occupation. Counsel states that the petitioner's net sales have "grown from \$12,048,912 in 2002, to \$22,348,295 in 2003." The AAO notes, however, that in the petitioner's August 12, 2002 letter of support, it states that it has a gross annual income of \$1.6 million, while on the Form I-129, the petitioner states that it had a gross annual income of \$12 million. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). There is no evidence in the record to establish the petitioner's gross annual income, its recent growth, or the level of complexity of its business. 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)).

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 two Internet job postings submitted by counsel in response to the director's request for evidence 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 they reflect the employment needs of several organizations with operations unrelated 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 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. It appears that this is a newly created position, and the petitioner is not able to meet this criterion.

While the AAO acknowledges that the petitioner has clearly stated its desire to hire a budget 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 August 12, 2002 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 budget 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.

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.