

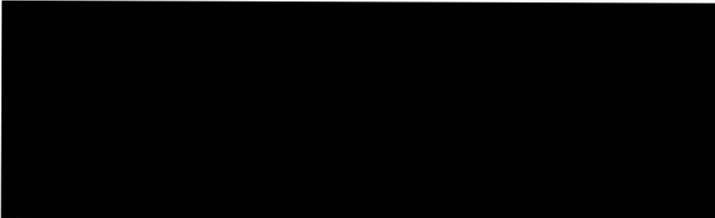


U.S. Citizenship
and Immigration
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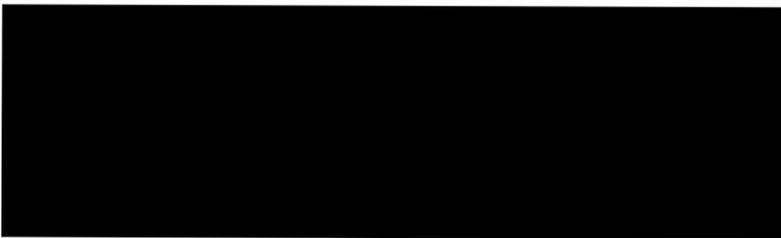
FILE: WAC 03 267 54471 Office: CALIFORNIA SERVICE CENTER Date: **MAR 28 2006**

IN RE: Petitioner:
Beneficiary:



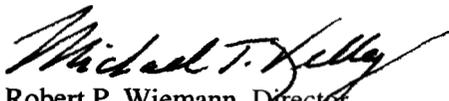
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

For 
Robert P. Wiemann, Director
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 general contractor and developer that seeks to employ the beneficiary as a financial 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 on the ground that the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted evidence.

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.

Evidence of the beneficiary's duties as a financial analyst includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's

request for evidence. According to this evidence, the beneficiary would perform duties that entail: compiling and analyzing financial information from all aspects of the organizational entity, and developing integrated revenue/expense analysis, projections, reports, and presentations; collaborating with and coordinating all components of the organization to ensure consistent reporting to federal and state financial reporting regulations and guidelines in conformity with fiscal policies and procedures; analyzing, designing, documenting, and implementing internal financial reporting systems and procedures; estimating the future income and expenses of the business as it relates to on-going operational costs and non-recurring capital expenditures; providing leadership and coordination to various technical personnel engaged in specific project activities; recommending changes that will profit the petitioner and will properly allocate financial resources; accounting all financial data relative to the proper presentation of budgetary issues; advising management on the most effective and efficient use of financial resources on a day-to-day basis as well as on a long-term basis.

In the denial letter, the director addressed two issues: (1) whether the petitioner demonstrated a reasonable and credible offer of employment; and (2) whether the proposed position qualifies as a specialty occupation. With respect to the first issue, the director found that the petitioner failed to pay the beneficiary the full wage she was entitled to as stated in the Form I-129 petition and the labor condition application (LCA) that accompanied the petition. The petition states that the beneficiary would be employed full-time and paid an annual salary of \$41,662. The record establishes, however, that the beneficiary was paid \$23,680 in the year 2001, and \$11,760 in 2002. As a result of these findings, the director found that the petitioner misrepresented information in the Form I-129 petition and the LCA, and as a result of this he could not determine the offered position's authenticity.

With regard to the second issue, the director stated that he was not persuaded that the beneficiary had actually performed the duties of a financial analyst for the petitioner. The director stated that sole reliance on duties resembling those of a financial analyst as that occupation is described in the 2006-2007 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) and the *Dictionary of Occupational Titles* (DOT) is misplaced. When determining whether a position qualifies as a specialty occupation, the director stated that the nature and complexity of the specific duties combined with the nature of the petitioning entity's business operations are factors that CIS considers. The director stated that the beneficiary's obtaining a degree in a related area does not guarantee the position is a specialty occupation; and that performing specialty occupation duties that are incidental to the primary functions is insufficient to establish a position as a specialty occupation. In denying the petition, the director found that the petitioner is not in the kind of industry that the *Handbook* describes as employing a full- or part-time in-house financial analyst. The director noted that the petitioner did not indicate its net annual income on the Form I-129 petition and failed to furnish verifiable and corroborating evidence of its annual income; thus, the director questioned whether the petitioner had capital to invest. Citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972), the director stated that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. According to the director, since the petitioner has only five employees, the beneficiary would perform some of the routine duties of financial clerks and would perform specialty occupation duties that are incidental to the primary function of a financial clerk. The evidence of record, the director stated, is not persuasive to show that the job

offered could not be performed by an experienced person whose educational training falls short of a baccalaureate degree.

On appeal, counsel states that the *Handbook* reveals that a financial analyst requires a bachelor's degree (or its equivalent) for entry into the occupation. Counsel contends that the proposed position resembles that of a financial analyst. According to counsel, the director conceded that some of the proposed duties are those of a financial analyst; however, the director failed to explain the incidental duties of a financial analyst or the duties that are not typical of the occupation. The director provided no reasoning or justification for concluding that the proposed position is not that of a financial analyst, counsel maintains. Referring to *Young China Daily vs. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989), counsel states that the case indicates that a petitioner is not required to establish that the size or type of industry involved typically needs the specialty occupation. Counsel states that the *Handbook's* description of employers of financial analysts is not exhaustive, and counsel refers to job postings to show that financial analysts are employed in diverse industries. Counsel asserts that the petitioner's business is expanding and that it needs a financial analyst to guide investments and asset management. Counsel concludes by stating that the beneficiary has been working part-time with the petitioner and that CIS policy guidelines indicate that an amended petition is not required for a minor change such as changing from full-time to part-time status.

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 notes that CIS approved another petition that had been previously filed by the petitioner on behalf of the beneficiary. 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 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 petition 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 petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

In the denial, the director discussed his concern about the beneficiary's wage. The regulation at 8 C.F.R.

§ 214.2(h)(11)(i)(A) addresses this issue. It states, in part, that a petitioner shall immediately notify CIS of any changes in the terms and conditions of employment of a beneficiary that may affect the beneficiary's eligibility under Section 101(a)(15)(H) of the Act. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E), a petitioner must file an amended petition to reflect any material change in the terms and conditions of an alien's employment. A material change is a change that directly impacts the alien's continued eligibility for H-1B classification. In this instance, the only change that occurred was a reduction in the hours that the beneficiary was permitted to work. The fact that a beneficiary's hours were reduced does not impact eligibility for H-1B classification as the petitioner could have originally petitioned for the beneficiary on a part-time basis, and the petition would have been approvable for part-time employment. As such, a change from full-time to part-time employment does not constitute a material change in the terms and conditions of employment.¹

The AAO next 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; 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The fact that a position involves some non-specialty-occupation duties does not necessarily preclude it from being a specialty occupation. A position may require a bachelor's degree (or its equivalent) in a discipline that relates to a financial analyst, even if some of its duties, such as bookkeeping or clerical tasks, do not. The *Handbook's* information does not suggest that a financial analyst is not employed in any particular business field, or that a business must have a particular organizational structure (such as having financial clerks) in order to substantiate the need for a financial analyst.

Nevertheless, the AAO does not find that the proposed position is that of a financial analyst as described in the *Handbook*. The *Handbook*, a resource that the AAO routinely consults, states the following with regard to the employment of financial analysts:

¹ In this proceeding the proposed duties are not found by the AAO to be those of a specialty occupation, although CIS previously found they were those of a specialty occupation.

Financial analysts and personal financial advisors provide analysis and guidance to businesses and individuals to help them with their investment decisions. Both types of specialists gather financial information, analyze it, and make recommendations to their clients. However, their job duties differ because of the type of investment information they provide and the clients for whom they work. *Financial analysts* assess the economic performance of companies and industries for firms and institutions with money to invest. . . . Financial analysts, also called *securities analysts* and *investment analysts*, work for banks, insurance companies, mutual and pension funds, securities firms, and other businesses, helping these companies or their clients make investment decisions. Financial analysts read company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates in order to determine a company's value and to project its future earnings. They often meet with company officials to gain a better insight into the firm's prospects and to determine its managerial effectiveness. Usually, financial analysts study an entire industry, assessing current trends in business practices, products, and industry competition. They must keep abreast of new regulations or policies that may affect the industry, as well as monitor the economy to determine its effect on earnings.

Financial analysts use spreadsheet and statistical software packages to analyze financial data, spot trends, and develop forecasts. On the basis of their results, they write reports and make presentations, usually making recommendations to buy or sell a particular investment or security. Senior analysts may even be the ones who decide to buy or sell if they are responsible for managing the company's or client's assets. Other analysts use the data they find to measure the financial risks associated with making a particular investment decision.

A financial analyst normally requires at least a bachelor's degree in business administration, accounting, statistics, or finance. Although the petitioner has identified its position as that of a financial analyst, its description of the beneficiary's duties lacks the specificity and detail necessary to substantiate the petitioner's contention. The petitioner failed to furnish a detailed description of the beneficiary's duties as they relate to the petitioner's business operations.² The duties are described in general terms, such as "[c]ollaborates with and coordinates all components of the organization to ensure consistent reporting"; "provides leadership and

² The proposed duties are described by counsel on pages 3-4 in the appeal brief. Some of the described duties, however, differ from the duties in the job description in the September 11, 2003 letter and the job description furnished in response to the request for evidence. For example, in the appeal brief counsel states that the beneficiary will "[s]chedule work to meet completion dates." No explanation is given regarding the addition of this duty. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

coordination to various technical personnel engaged in specified project activities”; “the ability to work with a wide range of constituencies in a diverse community”; and “advise the management on the most effective and efficient utilization [of] financial resources on a day[-]to[-]day operational basis as well as on a long[-]term basis.” The record provides no substantive information about what the performance of the duties in the petitioner’s particular business operations would entail in the theoretical or practical application of highly specialized knowledge at a bachelor’s degree level. CIS must examine the actual employment of a beneficiary, which are the specific tasks to be performed by the beneficiary, to determine whether a position qualifies as a specialty occupation. In light of the generic job description offered here, the AAO cannot identify the beneficiary’s specific tasks, and thereby, whether the position is that of a financial analyst or any other specialty occupation. Furthermore, without a reliable description of the position’s duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation.

On appeal, counsel asserts that the proposed position corresponds to the *Handbook’s* description of a financial analyst. However, a petitioner cannot establish that a position is a specialty occupation by describing the duties of that employment in general terms that do not relate the position to the petitioner’s specific business operations. 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.

The AAO notes that there is no evidence in the record of previous budgets or financial documents illustrating a scope or depth of financial transactions and operations indicating that the petitioner will employ the services of a financial analyst. In a June 25, 2004 letter from counsel, the petitioner asserts that the “presence of a [f]inancial [a]nalyt allowed the [p]etitioner to continue its remarkable growth from \$4.7 million in 2001, and achieve a record gross income of \$7.9 million in 2002.” The petitioner submitted no evidence that would substantiate its growth, however. In the denial, the director stated that the petitioner failed to furnish verifiable and corroborating evidence of its annual income and questioned whether the petitioner had capital to invest. The petitioner had an opportunity on appeal to provide additional evidence that would substantiate assertions made in the record, and thereby establish that the proposed position qualifies as a specialty occupation. However, no such evidence was submitted on appeal. Absent a more specific job description and supporting documentation, the AAO cannot evaluate the specific duties in relation to the petitioner’s business operations. 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)).

For the reasons discussed above, the evidence in the record is insufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), that a specific degree requirement is common to the industry in parallel positions among similar organizations, counsel refers to job postings. The job postings are not persuasive, as they do not represent companies similar in nature to the petitioner, a general contractor and developer. Elie Tahari is a women’s fashion company, Philips is a lighting company,

Uline distributes packaging and industrial supplies, and Johnson & Johnson Family of Companies is a large conglomerate. Ingersoll-Rand is not described in the posting. Together, the postings are insufficient to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner show that its particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. As discussed under 8 C.F.R. § 214.2(h)(iii)(A)(1), by describing the beneficiary's duties in general terms that do not associate the duties to the petitioner's specific business operations, and by failing to submit corroborating evidence which would show that the proposed position is that of a financial analyst, the petitioner fails to establish that the offered position is an occupation that has complex or unique duties requiring a baccalaureate degree in a specific specialty. As such, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence satisfies the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that 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. As related in the discussion of 8 C.F.R. § 214.2(h)(iii)(A)(1), the proposed position is described in exclusively general terms and the record lacks sufficient evidence that would establish that the nature of specific duties to be performed by the beneficiary is usually associated with a bachelor's degree in a specific field such as accounting, statistics, or finance. Consequently, the petitioner fails to establish this criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the 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.