

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

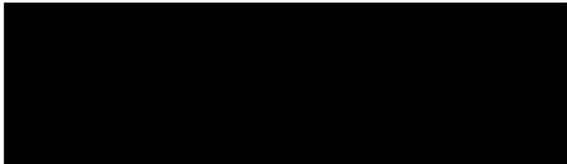
PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



**U.S. Citizenship
and Immigration
Services**

D1



FILE: SRC 05 144 50049 Office: TEXAS SERVICE CENTER Date: **AUG 20 2007**

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 black ink that reads "Robert P. Wiemann".

Robert P. Wiemann, 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 claims to engage in international trade and retail sales, to employ 25 personnel, and to have a gross annual income of \$1,013,198. It seeks to employ the beneficiary as a business management analyst. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 position is not a specialty occupation and that the beneficiary is not qualified to perform the duties of a specialty occupation.

The record of proceeding before the AAO contains: (1) the Form I-129 filed April 21, 2005 with supporting documentation; (2) the director's May 5, 2005 request for further evidence (RFE); (3) the petitioner's undated response to the director's RFE; (4) the director's June 16, 2005 denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The first issue before the AAO is 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 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) 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 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.

In an April 14, 2005 letter appended to the petition, the petitioner indicated that the beneficiary would be expected to oversee international trade. The petitioner indicated further:

[The beneficiary] will be responsible for determining which goods will be bought and sold based upon customer demand and the market. Additionally, she will communicate with overseas businesses to facilitate trade. [The beneficiary] will be responsible for monitoring the market demand for various products sold in the retail stores and will make business decisions regarding the same. [The beneficiary] will also be charged with making major policies for the businesses in the region and deciding on regulations and policies of the businesses. [The beneficiary] will be responsible for determining staffing requirements of [the petitioner] and will direct and coordinate [the petitioner's] financial operations. Directing the financial operations will include reviewing budget and overseeing investments of [the petitioner].

In an undated response to the director's RFE, the petitioner indicated that the beneficiary would be expected to perform any and all duties of a Division Leader/Business Development Manager, a position identified as a management analyst/consultant in the Department of Labor's *Dictionary of Occupational Titles (DOT)*. The petitioner further explained its type of business by indicating that it operates over 30 gas stations, a number of convenience stores, and several other businesses. The petitioner indicated that the proffered position involved: overseeing the management of all the existing Texas/Oklahoma locations; establishing new stations and stores as needed; advising the petitioner on business decisions and possibilities as they arise on a local and international level; negotiating contracts and closing deals; and directing individual store (station) managers.

The petitioner also provided excerpts from the *DOT* on management analysts and business operations specialists and from the Department of Labor's *Occupational Outlook Handbook (Handbook)* on the occupation of management analyst. The petitioner also submitted job advertisements from a number of convenience stores for the position of "manager" requiring a bachelor's degree in a related (but unspecified) field or two years of experience in retail, convenience stores, or the fast food industries. Of the over 15 job advertisements submitted only one for a management consultant for a consulting firm indicated that a bachelor's degree in the field of business administration, organizational development, project management or a related field would be required. The record also contains a copy of the petitioner's owner's resume.

The director denied the petition on June 16, 2005 determining that the petitioner had not described duties that would require a degree and that the submitted documents substantiated that the gas station/convenience store industry did not require a degree.

On appeal, counsel for the petitioner asserts: "[u]nder the first prong of the statutory definition of specialty occupation, [the beneficiary] possess over six (6) years of theoretical and practical knowledge directly related to Petitioner's needs," and "her fluency in Arabic compliments every aspect of Petitioner's daily businesses activities – from dealing with its internationals [sic] clients to communicating with the upper level management," and "[s]imilarly, since [the beneficiary's] equivalence of a Bachelor of Applied Science degree was attained through her school attendance and a combination of previous employment experience, which is by the way identical to the job requirements of Petitioner, the second prong of the statutory definition of a specialty occupation is also satisfied." Counsel asserts further: (1) the beneficiary has attained a Bachelor of Applied Science degree which is normally the minimum requirement for entry into the particular position; (2) the beneficiary's position, encompassing a unique blend of her prior experience, education, and foreign language skill, is common to the industry; (3) the beneficiary's predecessor also possessed a college degree for this position; and (4) the complexity of the position is usually associated with the attainment of a baccalaureate or higher degree. Counsel contends that the proffered position is for the occupation of a management analyst, an occupation the *Handbook* indicates requires a master's or bachelor's degree, and is not for a position as a gas station manager. Counsel asserts that the proffered position is complex and unique as compared to that of a gas station manager as the position will draw upon the beneficiary's experience and language skills to effectively expand and improve the petitioning company.

Counsel also notes that CIS initially approved an H-1B classification for the beneficiary that was approved for consular processing but that the beneficiary was in the United States in an F-1 classification. Counsel asserts that the denial in the instant matter is arbitrary and capricious as the beneficiary was previously approved for H-1B classification.

Counsel's assertions are not persuasive. The petitioner has provided a general overview of the duties of an occupation not of the proffered position. The petitioner has not provided a description of the actual daily duties of the proffered position. Rather, the petitioner seems to rely on the beneficiary's "qualifications" to establish the position is a specialty occupation. However, it is not the beneficiary's "qualifications" that establish a position as a specialty occupation but the duties the beneficiary will perform. The petitioner has not provided evidence of its international trade and has not provided evidence of its ownership of gas stations and convenience stores. 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)). The record does not contain evidence of the petitioner's expansion plans, if any. Most importantly, the petitioner has failed to adequately delineate the duties of the proposed position to enable CIS to determine whether the position is the position of a gas station manager or a manager of gas station managers or is performing the actual duties of a management analyst as described in the *Handbook*. The AAO is left with general information and no language or documentary evidence connecting the nonspecific duties to the petitioner's business. The AAO emphasizes again that the beneficiary's language ability or her past experience as an office manager or a food manager, both occupations that do not require a bachelor's degree, do not establish that the proffered position is a specialty occupation. It is the duties of the proffered position that govern the determination of whether a particular position is a specialty occupation.

The AAO declines to accept a broad overview of an occupation as definitive of a particular position's daily duties. The petitioner must provide detailed evidence of the daily tasks the petitioner requires from the proffered position. To recite generalities, rather than specifics substantiated by the requirements of the particular petitioner, leads to the absurd result of petitioners indiscriminately labeling and summarizing positions in an effort to obtain specialty occupation classification. Each petitioner must provide evidence of what the duties of the proffered position entail on a daily basis. Such descriptions must correspond to the needs of the petitioner and be substantiated by documentary evidence. To allow otherwise would require acceptance of any petitioner's generic description to establish that its proffered position is a specialty occupation. CIS, however, must rely on a detailed, comprehensive description demonstrating what the petitioner expects from the beneficiary in relation to its business and what the proffered position actually requires, in order to analyze and determine whether the duties of the position require a baccalaureate degree in a specialty.

The AAO routinely relies on the *Handbook* for the educational requirements of particular occupations. The 2006-2007 edition of the *Handbook* discusses the employment of management analysts as follows:

Management analysts, often referred to as *management consultants* in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. For example, a small but rapidly growing company that needs help improving the system of control over inventories and expenses may decide to employ a consultant who is an expert in just-in-time inventory management

* * *

Both public and private organizations use consultants for a variety of reasons. Some lack the internal resources needed to handle a project, while others need a consultant's expertise to determine what resources will be required and what problems may be encountered if they pursue a particular opportunity

* * *

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data, which may include annual revenues, employment, or expenditures and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem.

The petitioner's initial overview of the duties of the proffered position does not correspond to the *Handbook's* description of the duties of a management analyst. Rather, in the context of the record of proceedings, which does not establish that the petitioner is involved in international trade, that it or owns and operates multiple businesses, or that it is a growing business, the petitioner has provided a general overview of the duties of a retail manager, an occupation that does not require the theoretical and practical application of a body of highly specialized knowledge requiring the attainment of a bachelor's or higher degree in a specific specialty. Thus, the petitioner has not demonstrated that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant matter, the petitioner submitted numerous job announcements for convenience store/food retail managerial positions. The AAO notes that submitting these advertisements suggests that the petitioner will be employing the beneficiary in a position as a convenience store/food retail manager. The advertisements submitted confirm that a managerial position of this nature does not require a bachelor's or higher degree in a specific specialty. As previously noted, the advertisements submitted do not indicate that a bachelor's degree in a specific discipline is a requirement to perform the duties of the positions. When a degree of generalized title or a range of degrees is sufficient to perform the duties of a position, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Accordingly, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

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 evidence that distinguishes the proffered position from similar but non-degreed employment, as required by the second prong of the second criterion. Thus, 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 requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and whether the petitioner normally requires a degree or its equivalent for the position. The AAO acknowledges the resume of the petitioner's owner. However, the record does not contain sufficient documentation that the owner previously held the proffered position. Moreover, the record does not contain substantiating documentary evidence of the degree the petitioner's owner held and how the degree related to the generally described duties of the proffered 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. In this matter, the record lacks a sufficiently detailed description of the proffered position to compare to previous employment, as well as an insufficient description of duties performed by the individual previously in the proffered position. Further, the AAO notes that a petitioner's desire to employ an individual with a bachelor's degree does not establish that the position is a specialty occupation. As referenced above, the critical element is not the title of the position or 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 has not presented evidence that satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Turning to the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), the description of the duties in the record does not demonstrate that the duties are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific field of study. As observed above, the description of duties is insufficient to demonstrate the position is that of a management analyst. Likewise, the AAO does not find an overview of the duties of the position sufficient to show that the performance of the duties requires knowledge usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not provided any evidence that elevates the knowledge required of the position to one that requires the theoretical and practical application of a body of highly specialized knowledge or that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the petitioner has failed to classify the proffered position as a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For reasons related in the preceding discussion, the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the AAO will not disturb the director's denial of the petition.

The second issue in this proceeding is whether the beneficiary is eligible to perform the duties of a specialty occupation. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In this matter, the record contains the beneficiary's resume showing: (1) she held an administrative position from 1992 to 1999 filing, typing, drafting and sending letters, and running errands; (2) she held a food manager position from 1999 to 2002 selecting and pricing menu items, supervising food quality and service, handling administrative and human resource tasks, and placing orders with suppliers; and (3) she held an office manager position from 2002 to 2003 performing administrative tasks, scheduling principal's appointments, performing payroll and accounting tasks, using computer programs, and keeping track of teachers' and children's attendance. The record also contains letters from the beneficiary's previous employers confirming her employment. The record further contains the beneficiary's certificate showing she completed a nine-month curriculum for advanced computer studies. The transcript of the beneficiary's studies shows she completed courses in typing, office management, Internet, email, and MsAccess.

The petitioner also provided a February 18, 2004 evaluation based on the beneficiary's certificate in computer studies and 12 years of administrative experience. The evaluator concluded that the beneficiary had obtained the equivalent of a bachelor's of applied science in business (office administration).

The director determined that the record did not document that the beneficiary had received the equivalent of a bachelor's degree in any specific field of study. The director concluded that the beneficiary did not have the equivalent of a degree in the specialty occupation of a market research analyst.

On appeal, counsel for the petitioner notes the director's reference to the occupation of market research analyst and asserts that the director's reclassification of the proffered position requires a new analysis and comparison of the requirements of a business management analyst, an occupation that has a lower standard than that of a market research analyst.

The record in this matter does not contain evidence that the beneficiary has a United States baccalaureate or higher degree required by a specialty occupation from an accredited college or university, nor does the beneficiary hold an unrestricted State license, registration, or certification which authorizes her to practice a specialty occupation. The evaluation submitted by the petitioner does not establish that the beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree from an accredited college or university. Nor can the evaluation submitted establish that the beneficiary has the equivalent of a degree based on his or her combined education and employment experience under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4). When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

When attempting to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The petitioner in this matter has not established that the beneficiary is qualified to perform the duties of any specialty occupation pursuant to the first four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(D) above.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The petitioner must also document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities¹ in the same specialty occupation; membership in a

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's

recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record does not include any evidence that the beneficiary's work as an office manager or a food manager included the theoretical and practical application of the specialized knowledge required by any specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in a specialty occupation. The record also fails to include independent documentary evidence of the beneficiary's expertise. The record does not demonstrate that the beneficiary is eligible to perform the duties of a specialty occupation. For this additional reason, the petition must be denied.

The AAO acknowledges counsel's reference to the initial approval of the beneficiary in an H-1B classification but observes that prior approvals do not preclude CIS from denying a petition based on a reassessment of the petitioner's qualifications. *See Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). The AAO notes that each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). The AAO finds that if the record submitted in support of the first petition contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS 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). The AAO finds that the initial approval, if based on the same evidence in this record, was in violation of paragraph (h) of 8 C.F.R. § 214.2, and constituted material and gross error on the part of the director.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. As always, 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 met that burden.

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

opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinion, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(i)(C)(ii).