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

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FILE: WAC 02 034 53423 Office: CALIFORNIA SERVICE CENTER Date: **SEP 09 2005**

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.

Robert P. Wiemann, Director
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 wholesale and retail seller of diamonds that seeks to employ the beneficiary as an administrative assistant. 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 letter.

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 an administrative assistant. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 12, 2001 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: determining better ways to coordinate the effective use of money, materials, equipment and people by applying analytical methods from mathematics, science and engineering; strategizing, planning, forecasting resource allocation, managing performance, scheduling and managing systems for the petitioner's operational efficiency; solving problems in different ways and proposing alternative solutions to management; conducting analyses of management and operational problems and formulating mathematical or simulation models of problem for solution by computers or other methods; presenting recommendations to management based on the results of analysis; preparing reports to management defining problem, evaluation and possible solution; coordinating, supervising and reviewing office services, such as personnel, budget preparation and control, housekeeping, records control and special management studies; studying management and methods in order to improve workflow, simplify reporting procedures, or implement cost reductions; analyzing company operating practices, such as record keeping systems, forms control, office layout, suggestion system, personnel and budgetary requirements, and performance standards to create new systems or revise established procedures within the company; analyzing jobs to delimit position responsibilities for use in wage and salary adjustments, promotions and evaluation of workflow; studying methods of improving work measurements or performance standards for company employees; preparing reports such as conclusions and recommendations for solution of administrative problems in the company; and preparing, reviewing and monitoring preparation and monitoring of budget and annual reports of the company. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree.

The director found that the petitioner did not establish that the beneficiary would be performing the duties of the specialty occupation because the position was most like an office manager, a position that does not require a bachelor's degree in a specific specialty. 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 the position is most like an operations research analyst, a specialty occupation. Counsel asserts that the AAO determined in a previous decision that a position as an administrative assistant had many of the elements of an operations research analyst. Counsel also states that the position is of sufficient complexity to be considered a specialty occupation. Counsel states that the director erred in determining that the petitioner does not need an operations research analyst for its business, and that the petitioner's size is irrelevant to its need for such an employee.

The AAO does not agree with the director that the position is most like an office manager. The duties are more complex than those of an office manager. The AAO does not concur with counsel, however, that the position is most like an operations research analyst, a highly technical position that uses mathematical and computer modeling to solve problems. The position describes duties which are most like a management analyst, which is generally considered to be a specialty occupation. The issue that remains, however, is whether the petitioner will employ the beneficiary in the specialty occupation. Upon review of the record, the petitioner has not established that it will employ the beneficiary in a management analyst position.

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 Department of Labor's *Occupational Outlook Handbook (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 *Handbook* reveals that the beneficiary's duties do not rise to the level of a management analyst, an occupation that qualifies as a specialty occupation. According to the *Handbook*, management analysts, often referred to as management consultants in the private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. The *Handbook* reports that analysts and consultants collect, review, and analyze information in order to make recommendations to managers. They define the nature and extent of problems; analyze relevant data, which may include annual revenues, employment, or expenditures; interview managers and employees while observing their operations; and develop solutions to problems. Once a course of action is decided, consultants report their findings and recommendations to the client, and for some projects, consultants are retained to help implement their suggestions. According to the *Handbook*, firms providing management analysts vary in size from a single practitioner to a large international organization employing thousands of consultants.

As described by the petitioner, the duties of the proffered position are general and lack specificity as to how they relate to the petitioner's business. The petitioner indicates that it has two employees and a gross annual income of \$3,643,553, although the record contains no financial documentation to support this assertion. The petitioner does not provide any evidence of the complexity of the duties of the position of an administrative assistant or a management analyst in relation to 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)).

Based on the evidence in the record, the AAO cannot conclude that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, management analyst.

The *Handbook* describes in detail where management analysts are commonly employed; it states:

Management analysts held about 577,000 jobs in 2002. Thirty percent of these workers were self-employed, about one and a half times the average for other management, business, and financial occupations. Management analysts are found throughout the country, but employment is concentrated in large metropolitan areas. Most work in management, scientific, and technical consulting firms, in computer systems design and related services firms, and for Federal, State, and local governments. The majority of those working for the Federal Government are in the U.S. Department of Defense.

The *Handbook's* quoted passage does not mention that the petitioning entity, a diamond seller with two employees, would be a likely employer of a management consultant. This passage supports the AAO's determination that it cannot conclude that the duties of the proposed position correspond to those of a management analyst, or that the petitioner will employ the beneficiary temporarily as a management analyst.

The petitioner did not submit any evidence regarding parallel positions among similar organizations, or evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. There is no evidence in the record regarding the petitioner's past hiring practices.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(4)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. For this reason the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that the petition was submitted on November 8, 2001 with an uncertified labor condition application (LCA). On January 16, 2002, the director requested additional evidence, including a certified LCA. The petitioner responded on April 12, 2002, submitting an LCA that was certified on February 18, 2002. The regulations state, "Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed." 8 C.F.R. § 214.2(h)(4)(B)(1). Since the LCA was certified more than three months after the petition was filed, for this additional reason, the petition may not be approved.

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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.