U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 228 55484 Office: CALIFORNIA SERVICE CENTER Date: DEC 10 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

PUBLIC COPY

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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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 a packaging and shipment services company and currently has five employees. It seeks to hire the beneficiary as an operations manager. 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 letter from the petitioner.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner'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 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 an operations manager. Evidence of the beneficiary's duties includes: the Form I-129; a July 31, 2003 support letter from the petitioner accompanying the Form I-129; and the petitioner's October 24, 2003 response to the director's request for evidence.

In its July 31, 2003 letter, the petitioner stated the beneficiary's duties would require her to oversee and direct its functions and personnel related to its inventory distribution and control, specifically to:

- Analyze, report and explain to the President the efficiency and dependability of the company's operating systems;
- Evaluate, report on, and implement best available operating technologies to improve efficiency;
- Assist with the development of corporate financial and organizational policies and goals;
- Assume responsibility for the day to day operations -- insure that operations are in accordance with values, principles, mission and policies of management and meet all legal requirements, and prepare, submit for approval, and oversee implementation of departmental budgets;
- Analyze the effectiveness of operations in achieving financial goals and take prompt corrective action as needed;
- Evaluate and modify daily operations to maximize efficiency and cost effectiveness;
- Promote clear communications with distribution center employees;

- Provide consultation, analysis, recommendations and assistance to facilities and regions in relation to logistics efforts;
- Participate in the development, physical layout and startup of new facilities;
- Develop and distribute standard specifications and pricing for services, products and costs;
- Identify, record and reallocate underutilized or unused inventory;
- Select, evaluate, mentor and discharge department staff; and
- Participate in outside professional activities that are advantageous toward enhancing business development.

On August 14, 2003, in his request for evidence, the director specifically asked the petitioner for additional information regarding its proffered position, including the specific duties of the job, the percentage of time to be spent on each duty, level of responsibility, hours of work per week, types of employees supervised, and the minimum education, training, and experience necessary to do the job. He also requested an explanation from the petitioner as to why the work required the services of a person who has a college degree or its equivalent in the occupational field.

In its response to the director's request for evidence, the petitioner provided a significantly different description of the proffered position's duties. The specific duties listed in response to the director's query described an administrative position with markedly less responsibility and no longer emphasized the evaluative and analytical duties of the job that had been highlighted at the time of filing. The petitioner's second description of the position stated:

> Financial Duties and Responsibilities – assume bookkeeping and accounting responsibilities; assume tax planning responsibilities; perform cashflow projections; manage cashflow from financing activities, making financing recommendations to owner based on cashflow projections; ensure targeted revenue projections are achieved; and assume payroll responsibilities, including creating payroll and payroll reporting.
>
> Operational Duties and Responsibilities – motivate, train and develop all associates, focusing on excellent customer service and rapport building; ensure that each center is fully staffed with a competent team, and that this team receives the necessary training to perform their job requirements effectively; maintain a high level of sanitation and orderliness; consistently maintain and improve center imaging, impact zones and display areas; maintain consistent communications with the owner regarding all areas of center operations; ensure that operational systems are in compliance with guidelines; assist center management in achieving revenue projections through the use of budget forms, P Cap reports and other available tools; assist the center manager in all areas of inventory control, ordering, stock and vendor relationships; ensure that all center associates maintain a professional, well-groomed appearance at all times; pro-actively handle customer complaints and assist customers with problems to resolution; accurately perform daily close-out procedures, general ledger administration, bank deposits and other accounting functions in accordance with company

> policy and procedure; efficiently use MBE computer systems in support of communication, reporting and other business requirements; assist the center manager in planning, preparing and conducting meetings, developing incentive programs and other related activities; plan, prepare and conduct meetings, develop incentive programs and other related activities; and general housekeeping duties.

At the time of his denial, the director noted the significant differences between the petitioner's initial description of the position's duties and that provided in response to his request for additional information. He concluded that the petitioner's differing position descriptions prevented CIS from being able to determine that the proffered position qualified as a specialty occupation. Instead, he found the position to combine the duties of an administrative services manager and bookkeeper, neither of which require applicants to have the minimum of a baccalaureate or higher degree to seek employment. The director also concluded that the proffered position failed to meet any of the regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To make its determination whether a proffered position qualifies as a specialty occupation, the AAO normally turns to 8 C.F.R. § 214.2(h)(4)(iii)(A) to assess the extent to which the petitioner has established that its position qualifies under one of the four criteria outlined there. In the instant case, however, the AAO finds itself unable to perform this analysis as it lacks a reliable description of the duties of the proffered position.

The AAO's review of the position descriptions provided by the petitioner at the time of filing and in response to the director's request for information identifies the same inconsistencies and alterations already noted by the director in his denial. On appeal, the petitioner attempts to resolve these discrepancies but, instead, provides a third description of how the beneficiary will operate within its organization that casts further doubt upon the description of the duties it originally provided.

In his denial, the director noted that a petitioner may not make material changes to the duties of a position at the time of its response to a request for evidence. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg.Comm. 1978). As a result, the AAO will not consider the significantly amended list of position duties provided by the petitioner at the time of its response to the director's request for evidence.

In situations where a petitioner has materially amended the description of a position, either in response to a request for evidence or on appeal, it is usually to supplement or otherwise enhance the duties described at the time of filing. In such cases, the AAO discounts these enhancements and relies on the petitioner's initial description of the duties associated with the proffered position. The instant case, however, presents the AAO with a reversed situation. Here, the petitioner's detailed response to the director's request for more information regarding the position's duties downgrades the responsibilities of the position it originally described and, in doing so, calls into question the accuracy of its original description.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. *Matter of Ho,* 19 I&N Dec. 582, 591-92 (BIA 1988). Although, on appeal, the petitioner attempts to resolve the discrepancies between its differing position descriptions, its assertions in this regard cannot be viewed as independent objective evidence. Therefore, in light of the doubt cast on the petitioner's initial description of its position's duties by its response to the director's request for evidence, the AAO concludes its original submission of duties cannot serve as a reliable description of the proffered position. Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho,* 19 I&N Dec. 582, 591 (BIA 1988).

In that the AAO has concluded it cannot rely on the petitioner's description of its position at the time of filing, it has no evidence regarding the proffered position on which to base its analysis of whether it qualifies as a specialty occupation per the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). As a result, the AAO concurs with the director's decision that the petitioner has failed to meet its burden of proof in establishing that its proffered position qualifies as a specialty occupation. This decision is reached on grounds other than those relied upon by the director. The AAO, however, reviews appeals on a *de novo* basis and has the authority to deny petitions that fail to comply with the technical requirements of the law, even if the basis for the AAO's denial was not identified in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

In this proceeding, the petitioner also provides information that leads the AAO to question whether, at the time of filing, the proffered position existed as described. In making its case on appeal, the petitioner references its plan to expand its operations as the "main reason why we require a person with such formal education and experience to fill the position" and that it requires someone to "ultimately manage at least three stores, preferably five." These statements lead to the conclusion that the petitioner is seeking the beneficiary's services for its anticipated future operations, but does not have an existing specialty occupation for which it requires the beneficiary's services, as required by regulation.

On appeal, counsel for the petitioner requests the opportunity to make an oral argument regarding the issues in this case. Regulation, however, requires the requesting party to explain in writing why an oral argument is necessary. Further, CIS, which has the sole authority to grant or deny a request for oral argument, will grant such argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel has identified no such factors or issues, nor offered any specific reasons why oral argument should be held. The AAO finds the written record of proceedings to fully represent the facts and issues in this case and, consequently, denies the request for oral argument.

Therefore, for reasons related in the preceding discussion, 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.