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Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services



FILE: WAC 02 156 52244 Office: CALIFORNIA SERVICE CENTER Date: OCT 22 2004

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:

SELF-REPRESENTED

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 healthcare and investment company. It seeks to employ the beneficiary as a management analyst and 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 bases that the offered position was not a specialty occupation, and that the petitioner had not established that it would actually be the employer of the beneficiary. On appeal, the petitioner submits a brief and additional information.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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:

[A]n 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 are 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 proceedings 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) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a management analyst. Evidence of the beneficiary's duties was included with the Form I-129 petition and in response to the director's request for evidence. According to this evidence the beneficiary would: analyze and provide advice on the managerial method of the company; conduct studies to determine the efficiency and effectiveness of management policies and programs; conduct assessments and propose improvements to existing systems and operational procedures; and plan the reorganization of company operations. The petitioner requires a minimum of a bachelor's degree in business administration with an emphasis on management for entry into the proffered position.

The director found that the offered position did not qualify as a specialty occupation and failed to meet any of the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, the petitioner indicates that the offered position qualifies as a specialty occupation.

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations. 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 an industry 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. Min. 1999) (quoting *Hird/Baker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are set forth in such vague and generic terms that it cannot be determined precisely what tasks the beneficiary would perform on a daily basis. For example, the petitioner states that the beneficiary would analyze and provide advice on the managerial method of the company, conduct studies to determine the efficiency and effectiveness of management policies and programs, propose improvements for existing systems and operational procedures, and plan the reorganization of company operations. The duties as defined prohibit an analysis of precisely what tasks the beneficiary

would perform in completing those duties and the complexity or sophistication of those tasks. The duties to be performed could involve highly complex tasks that involve the theoretical and practical application of specialized knowledge, or, they could simply involve day-to-day managerial/administrative/operational tasks routinely performed by those having less than a baccalaureate level education. It is impossible to make that determination based upon the record as it now exists. It should further be noted that management analysts are generally employed as consultants, not as employees, in businesses similar in nature and scope to that of the petitioner. As such, the petitioner has not established that: a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position; a degree requirement is common to the industry in parallel positions among similar organizations, or alternatively that the duties of the proffered position are so complex or unique that they can be performed only by an individual with a degree in a specific specialty; or that the duties of the proffered position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The petitioner has failed to establish any of the regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2), or (4).

The petitioner states that it normally requires a degree or its equivalent for the offered position and meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). In support of this assertion, the petitioner lists two former management consultants who were employed as independent contractors. The petitioner provides a copy of a diploma for one of the consultants indicating that the consultant possessed a bachelor's degree in business administration from a university in the Philippines. The record does not indicate, however, that the consultant's degree is equivalent to a bachelor's degree from an accredited college or university in the United States. No documentary evidence was submitted with regard to the other consultant's educational credentials. The documentation submitted is insufficient to establish that the employer normally requires a degree or its equivalent in a specific specialty for entry into the proffered position. Assuming *arguendo* that the employer does normally require a baccalaureate degree in a specific specialty for entry into the proffered position, the position still does not qualify as a specialty occupation. The performance of the duties of the position must still involve the theoretical and practical application of a body of highly specialized knowledge. *Cf. Defensor v. Meissner*, 201 F.3d 388 (5<sup>th</sup> Cir. 2000). As noted above, the duties of this position are so vaguely described that it cannot be determined that the performance of the duties involves the theoretical and practical application of specialized knowledge.

The director also found that the petitioner may not be the actual employer of the beneficiary. This conclusion was based on a third quarter wage report for 2002 wherein some of the petitioner's listed employees were not shown to have drawn wages from the petitioner during that quarter. Documentation supplied by the petitioner with regard to its employees/business operations contains material inconsistencies.

- A letter dated March 27, 2002, claims that the petitioner has 32 employees. The Form I-129 filed less than two weeks later, however, on April 9, 2002, notes that the petitioner has 34 employees. The petitioner provided a Form DE6 Quarterly Wage and Withholding Report for the quarter ending March 31, 2002 indicating that it had 28 employees for that same period.
- In response to a request for evidence, the petitioner provided a December 3, 2002 list of employees, in which it claimed to have six H-1B visa employees. None of those employees, however, appear on the petitioner's Form DE6 Quarterly Wage and Withholding Report for the period ending September 30, 2002. After this was noted in the director's decision, the petitioner submitted an unsigned,

undated Form DE6 for the quarter ending December 31, 2002 which indicates that the employer has 26 employees. The petitioner claimed that three of the employees noted in the director's decision were in fact currently employed as reflected on the December 31, 2002 Form DE6. The petitioner further claimed that the other three employees noted in the director's decision (and claimed to be "currently working" for the petitioner on the December 31, 2002 employee list) had left its employ and "were listed in error."

The petitioner notes on a list of Form I-129 petitions filed in response to the director's request for evidence, that Rungrat Aroonvaragron, service file number WAC 98 131 51585, was employed by it from 10/05/1998 – 04/01/2000 when his contract expired. This individual, however, is listed as an employee in the quarter ending June 30, 2002, on the petitioner's Form DE6.

The petitioner has not provided a reasonable explanation for any of the discrepancies with respect to the number of claimed employees, or why it appears to have been providing inaccurate Forms DE6 to both CIS and the State of California. Based on the conflicting evidence supplied by the petitioner, it is unclear whether it has 28, 32, or 34 employees. 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. 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, 591-92 (BIA 1988). The conflicting evidence is material to the claim in that it brings into question the nature of the petitioner's business, and whether in fact it operates a business for which H-1B employment classification is warranted. The petitioner has not demonstrated that it will be able to hire, fire, supervise, and control the beneficiary, much less any of its current employees. Accordingly the petitioner does not meet the definition of a U.S. employer within the meaning of 8 C.F.R. § 214.2(h)(4)(ii). For this additional reason, the petition must be denied.

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 and the appeal shall accordingly be dismissed.

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