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U.S. Citizenship and Immigration Services

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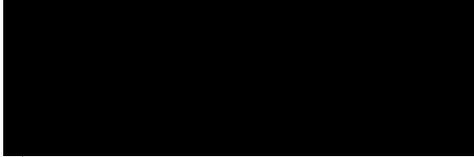


FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: APR 11 2005

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.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

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 residential care facility for the elderly, with three employees. It seeks to hire the beneficiary as a part-time management analyst. The director denied the petition based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief, and new and previously-submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The 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, a 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 a management analyst. Evidence of the beneficiary's duties includes: the Form I-129; a letter of support from the petitioner submitted at the time of filing; and counsel's January 29, 2004 response to the director's request for evidence.

At the time of filing, the petitioner stated that, as a result of the rapid growth of its business, it required a management analyst to review its operations and propose ways to improve its organizational structure, its efficiency and profits, and its system of control over expenses. As indicated by the petitioner, the specific duties of the position would require the beneficiary to:

- Analyze and propose ways to improve the petitioner's structure, efficiency, and profits, including implementing promotional strategies;
- Improve the system of control over expenses by analyzing sales and financial data;
- Review forms and reports, and confer with management and users about format, distribution, and purpose; identify problems and improvements;
- Plan study of work problems and procedures, such as organizational change, communications, information flow, and cost analysis; gather and organize information on problems and procedures; analyze data gathered and develop solutions or alternative methods of proceeding; and document findings and prepare recommendations for implementation of new systems, procedures or organizational changes;
- Develop and implement records management program for filing, protection and retrieval of records, and assure compliance with the program;
- Prepare manuals and train workers in use of new forms, reports, procedures or equipment; and
- Design, evaluate, recommend, and approve change of forms and reports.

On appeal, counsel asserts for the first time that, as the beneficiary would report to the petitioner's vice president and her work would complement the vice president's, the beneficiary's duties should be read in conjunction with those of the vice president and interpreted accordingly. This amounts to an introduction of new, previously unidentified responsibilities that materially exceed those presented prior to the appeal. On appeal, 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 the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may also not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Accordingly, the AAO will not accept counsel's expanded description of the proffered position, but will consider only those duties that had been identified by the petitioner at the time of the director's decision, as listed above.

To determine whether these duties are those of a specialty occupation, the AAO first 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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 his denial, the director determined that the petitioner's description of its proffered position was too generalized to establish a management analyst position. He found the duties listed by the petitioner to paraphrase those described by the 2002-2003 edition of the DOL *Handbook* in its discussion of the work performed by management analysts. The AAO also finds several aspects of the petitioner's description to be too generic -- e.g., analyze and propose ways to improve the petitioner's structure, efficiency, and profits; plan study of work problems and procedures, such as organizational change, communications, information flow and cost analysis; and gather and organize information on problems or procedures -- to convey the specific tasks to be performed by the beneficiary on a daily basis. However, certain other duties listed by the petitioner at the time of filing do indicate specific activities that would be performed by the beneficiary. Accordingly, the AAO will rely on these duties and the light they shed on the undefined aspects of the petitioner's employment to identify the nature of the proffered position.

As the petitioner has characterized its position as that of a management analyst, the AAO first turns to the *Handbook's* description of that occupational title. The *Handbook*, at pages 87-88, describes the occupation of management analyst as follows:

As business becomes more complex, the Nation's firms are continually faced with new challenges 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

Firms providing management analysis range in size from a single practitioner to large international organizations employing thousands of consultants. Some analysts and consultants specialize in a specific industry, such as healthcare . . . while others specialize by type of business function The work of management analysts and consultants varies with

each client or employer, and from project to project In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers

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. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture

Once they have decided on a course of action, consultants report their findings and recommendations to the client. These suggestions usually are submitted in writing For some projects, management analysts are retained to help implement the suggestions they have made.

Although the petitioner has stated its proffered position is that of a management analyst, the duties of the position that have been clearly articulated are not those of a management analyst/consultant. Instead, they fall within the general area of administrative support -- the development and implementation of a records management program, the review and improvement of its forms and reports, the development of manuals and training for those who would use the new forms and reports, and improving the system controlling expenses. When the generic descriptions of the beneficiary's analytical duties are viewed in conjunction with these specific administrative responsibilities, they appear to involve the type of analysis and review routinely performed in support of business operations, rather than the broad-ranging organizational and operational analyses conducted by management analysts. Accordingly, the AAO finds most of the duties of the proffered position to be closely aligned to those of an office manager, a profession the *Handbook* includes within the occupational title of secretaries and administrative assistants. However, the position's responsibility for improving the petitioner's system for controlling expenses appears to require the beneficiary to also function as a bookkeeper.

The work of secretaries and administrative assistants is described by the *Handbook* at pages 469-470:

Secretaries and administrative assistants are responsible for a variety of administrative and clerical duties necessary to run an organization efficiently. They serve as an information manager for an office . . . organize and maintain paper and electronic files, manage projects, conduct research

Specific job duties vary with experience and titles. Executive secretaries and administrative assistants . . . may handle more complex responsibilities such as conducting research, preparing statistical reports, training employees and supervising other clerical staff.

A discussion of the employment of bookkeepers, included within the occupational title of bookkeeping, accounting and auditing clerks, is found at pages 437-438 of the *Handbook*:

Bookkeeping, accounting, and auditing clerks are an organization's financial recordkeepers. They update and maintain one or more accounting records, including those which tabulate

expenditures, receipts, accounts payable and receivable, and profit and loss. They have a wide range of skills and knowledge from full-charge bookkeepers who can maintain an entire company's books to accounting clerks who handle specific accounts

In small establishments, bookkeeping clerks handle all financial transactions and recordkeeping. They record all transactions, post debits and credits, produce financial statements, and prepare reports and summaries for supervisors and managers They also may handle payroll, make purchases, prepare invoices, and keep track of overdue accounts

[D]emand for full-charge bookkeepers is expected to increase, because they are called upon to do much of the work of accountants

In that the *Handbook* states that entry level positions in both of these occupations may be filled by individuals with high school degrees, the AAO concludes that the proffered position does not constitute employment that normally requires job applicants to hold a baccalaureate or higher degree, or its equivalent. Accordingly, the AAO finds that the position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that the administrative nature of the proffered position's duties is also reflected in counsel's response to the director's request for evidence. In stipulating that the beneficiary would not be required to supervise any employees, counsel stated that she would train workers in the use of new forms, reports, procedures or equipment once she designed a new system to increase the efficiency of the business. This discussion of the beneficiary's duties does not describe the employment of a management analyst, but of an individual responsible for ensuring adequate administrative support for the petitioner's business operations.

On appeal, counsel submits material from the *Occupational Information Network (O*Net)*, which has replaced the DOL's *Dictionary of Occupational Titles (DOT)*, showing the occupation of management analyst to have a job zone rating of 4 and a Special Vocational Preparation (SVP) rating of 7-8. As the AAO has determined that the proffered position is not that of a management analyst, this material is not probative for the purposes of this proceeding. However, the AAO notes that the *O*Net* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how these years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. Further, a job zone rating of 4 does not indicate that a bachelor's degree in a specific specialty is required.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4) -- establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. At

the time of filing, counsel submitted 14 Internet job postings to establish the petitioner's degree requirement as the norm within its industry. However, these announcements cannot serve as evidence of an industry norm. They advertise openings for management analysts and the proffered position is not that of a management analyst. Further, the organizations represented by these postings are not similar to the petitioner, i.e., they are not businesses engaged in providing residential health care. As a result, they do not establish that the petitioner's degree requirement is common among parallel positions in similar organizations. With regard to the second prong of the criterion, the AAO's review of the record finds no evidence to establish a degree requirement on the basis of the position's complexity or unique nature.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, the AAO normally 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 the instant case, the petitioner has stated that the rapid growth of its business has led to establish the proffered position. As a result, the petitioner has no past hiring practices with regard to the position and cannot establish it as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

However, on appeal, counsel contends that the proffered position is established as a specialty occupation by virtue of the petitioner's current degree requirement, indicated by its newspaper advertisements for the job. While the AAO acknowledges the petitioner's desire to hire an individual with a bachelor's degree to fill its position, it is not the petitioner's preferences that dictate whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). That determination can only be made through the application of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In response to the director's request for evidence, counsel asserted that the proffered position meets the requirements of the fourth criterion, supporting her statements with the occupational discussions of management analysts in the *Handbook* and the *O*Net*. However, as the AAO has determined that the proffered position is not that of a management analyst, these materials are not probative. On appeal, counsel again contends that the duties of the proffered position, as described, are too complex to be performed without a baccalaureate degree in a related field.

However, the AAO has reviewed the duties of the position to determine whether the responsibilities involved require a higher degree of knowledge and skill than would normally be expected of an office manager/bookkeeper. Despite counsel's assertions regarding the position's complexity, this review has found

no reason to conclude that the responsibilities of the proffered position are any more specialized or complex than those normally performed by individuals whose administrative activities support the operations of U.S. business operations. Therefore, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel references the AAO's approval of two previous H-1B petitions with generic listings of duties similar to that in the instant case. She characterizes the previous decisions as precedent, binding the AAO under 8 C.F.R. § 103.3(c) to approve the instant petition. However, the AAO decisions referenced by counsel are not precedent decisions as described at 8 C.F.R. § 103.3(c). While they may reference position duties similar to those now before the AAO, CIS is not bound 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). Each petition filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth 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.