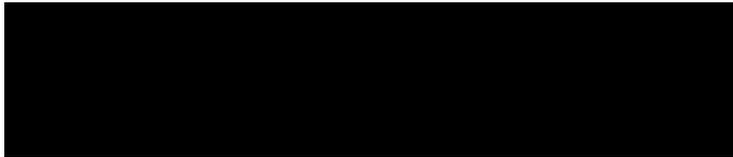


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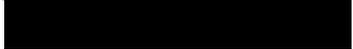
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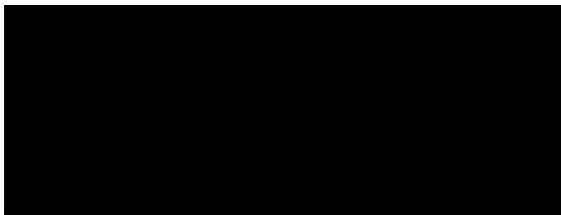
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FILE: WAC 04 082 52559 Office: CALIFORNIA SERVICE CENTER Date: **AUG 08 2005**

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 limited liability company engaged in the business of managing night venues and restaurants that seeks to employ the beneficiary as an operations management specialist. 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 files a brief and previously submitted documents.

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 (5<sup>th</sup> 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 management specialist. Evidence of the beneficiary's duties includes: the Form I-129; a letter of support from the petitioner; and the petitioner's March 18, 2004, response to the director's request for evidence. At the time of filing, the petitioner stated that the beneficiary would perform duties that entail: (1) performing business analysis activities at the strategic, operational, and organizational level; working with management in the continual improvement of business processes; developing, implementing, monitoring programs in order to make recommendations for new or revised operational programs and systems in order to improve service, reduce costs, enhance products, and achieve operational goals (20% of time); (2) acting as an internal specialist to perform needs assessments to determine, design and recommend the best training program for management and staff; performing problem solving information/operational needs in hospitality industry and restructuring/converting processes by applying knowledge of business unit operations to the development and maintenance of computerized and non-computerized systems and processes; (3) documenting process workflows using various tools and methods, including diagrams, flowcharts, process maps, systems models, presentations, and policy and procedure documents; reviewing submitted reports on all aspects of the operation including sales, costs, hiring, training, ordering inventory and marketing (15% of time); (4) defining and prioritizing system problems and enhancing requests; developing a solid understanding of industry best practices in service related operations in order to map business processes and compare those processes to industry best practices; assisting in developing and administering the annual budget, including information gathering and monitoring of expenditures (20% of time); (5) assessing performance development needs, compiling information, analyzing subject matter, writing and distributing performance development materials for all staff/management level positions; developing detailed project plans covering the entire systems development life cycle of the company, and associated project budgets for the next fiscal year (15% of time). The petitioner indicated that the position requires a bachelor's degree or its equivalent.

The director requested additional information about the proffered position, specifically, evidence that the position of operations management specialist is a common position required by similarly sized offices with similar annual incomes. The director requested evidence that the petitioner's competitors normally require degrees for closely related positions to that of operations management specialist. Additionally, the director requested information about the petitioner such as federal income tax returns, Form DE-6 wage reports and the petitioner's organizational chart.

In response to the director's request for evidence, the petitioner indicated that it was submitting certification from six companies attesting that a bachelor's degree in business management is a common industry

requirement for the position of an operations management specialist. The petitioner contended that it previously contracted the services of an external operations management analyst which was costly and inefficient. The petitioner explains that the beneficiary will be assigned to its operations department which oversees the operations of its various clubs and restaurants such as Tengu, Lincoln and Venice Cantina, which are all under the management of the petitioner. The petitioner submitted a copy of Form 1065 U.S. Return of Partnership Income for tax year 2002 which indicated gross receipts or sales of \$1,422,544 and a loss of \$484,150. The Form I-129 indicated a gross annual income of over \$4 million dollars. The petitioner provided an organizational chart and job descriptions for each position. The petitioner submitted biographic data on the persons listed as partners on the petitioner's organizational chart. The biographic data indicated that they were also affiliated with SGM Corporation. Additionally, the petitioner provided Forms DE-6 indicating more than sixty employees as well as payroll records.

The director stated that the duties of the proffered position reflect those performed by a management analyst as listed in the Department of Labor's *Occupational Outlook Handbook* (The *Handbook*). The director further explained that sole reliance on a list of duties resembling those of a management analyst taken from the *Handbook* to establish that the proffered position is a specialty occupation is misplaced. Additionally, the director did not find a reasonable and credible offer of employment that is consistent with the needs of the petitioning organization. The director noted that this can be shown by demonstrating that the types of duties to be performed are not normal and customary requirements in similar organizations in the petitioner's industry. The director found that the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income require the services of individuals in parallel positions. Additionally, the director noted that the petitioner did not present specific, credible evidence showing that its organization has unique and specific needs for such services for the period of time in which they intend to employ the beneficiary. Consequently, the director concluded that there was not a bona fide position which could be considered a specialty occupation.

On appeal, counsel asserts that the position of management analyst qualifies as a specialty occupation by virtue of the proffered duties and qualifications of the beneficiary. Counsel explains that the purpose of the petitioner in employing a full-time management analyst for its corporate office is for the management analyst to be familiar with its operations and not simply to conduct research and analyze data. Counsel notes that the petitioner is engaged in the business of operating night venues for private parties and events, and that the beneficiary would not be performing his function at the night venue itself. Counsel assert "[I]t is ubiquitous that the position of management analyst would be essential in the operations of the petitioner which employs sixty one (61) employees and with gross annual income that exceeds (\$4,329,471.00)." Counsel cites several unpublished decisions in support of his contention that management analysts are considered specialty occupations.

The AAO notes while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. 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. The petitioner does not explain with any details the beneficiary's duty to "develop, implement, monitor programs in order to make recommendations for new or revised operational programs and systems in order to improve service, reduce costs, enhance products, and achieve operational goals" and "perform business analysis activities at the strategic, operational, and organizational level." The petitioner refers to the industry in the specific duty of "problem-solve information/operations needs in hospitality industry and restructure/convert processes by applying knowledge of business unit operations to the development and maintenance of computerized and non-computerized systems and processes." However, the petitioner does not relate these general duties to its actual business of managing night venues and restaurants. On appeal, counsel notes that the beneficiary would not be performing his functions in the night venue itself. The petitioner has not explained how the beneficiary would perform his functions in relation to the petitioner, a limited liability company. The petitioner did not provide sufficient evidence explaining how many clubs and restaurants it manages. Counsel asserts that the petitioner grossed over \$4 million in sales, yet the submitted tax return indicated gross sales of less than \$1.5 million. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

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, operations management specialist. As noted above, the petitioner contends that the proffered position resembles a management analyst position.

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 company with 60 employees that manages an indeterminate amount of clubs and restaurants, 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.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel relies on six letters from six companies that it indicated are engaged in the food and beverage industry.

This evidence fails to establish that a specific baccalaureate degree is common to the industry in parallel positions among similar organizations. The petitioner did not provide evidence that these six companies are similar in size, income and nature to the petitioner. It is not clear from the letters if these entities have employed operational management analysts. Additionally, it is noted that one letter is from a company called Nacional, which the petitioner stated is under its management. The letter is signed by [REDACTED], who the petitioner indicated on its organizational chart is its controller. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*. Consequently, the letters fail to establish that there is a specific baccalaureate degree that is a common industry-wide requirement.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a specific degree. Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a specific degree or its equivalent for the position. The petitioner indicated that it had previously used an external operations management specialist, however it did not provide any evidence of past consultant employment contracts. 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 fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Again, the evidentiary record does not depict the duties of the proffered position as rising to those of a management analyst as described in the *Handbook*.

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.

Additionally, the AAO notes that the *Handbook* indicates that for the specialty occupation of management analyst, most employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. The record reflect that the beneficiary has the equivalent of a bachelor's degree in business management so would not be qualified for the position of management analyst. As the proffered position has not been found to be a specialty occupation, the beneficiary's qualifications are irrelevant.

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.