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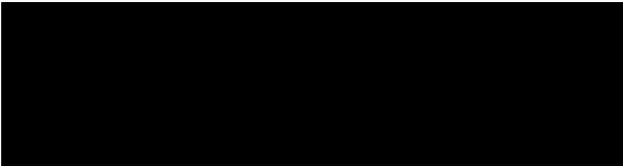
DZ

FILE: WAC 03 055 50999 Office: CALIFORNIA SERVICE CENTER Date: DEC 21 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 marketing firm, with 17 employees as of the time of filing. It seeks to employ the beneficiary, who is currently approved for H-1B status from July 26, 2001 to July 1, 2004, as a budget analyst 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 he determined the 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 additional evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief, and new and previously submitted evidence. The AAO reviewed the record in its entirety before issuing 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, 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 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:

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 seeks the beneficiary’s services as a budget analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the October 7, 2002 letter of support provided by the petitioner; and counsel’s discussion of the proffered position’s duties provided on appeal. In completing the Form I-129, counsel stated that the duties of the proffered position would require the beneficiary to:

- Study and analyze current and past budgets, and forecast future budgets considering the expansion objectives and the volume of products coming in and out;
- Assist in the formulation of policies affecting the allocation of funds consistent with present marketing objectives;
- Coordinate with the accounting staff in analyzing accounting records to determine financial recovery required in the allocation of funds; and
- Recommend programs on cost analysis and fiscal allocation.

On appeal, he further indicated that the beneficiary, in formulating the petitioner’s budget, would also:

- Analyze accounting records, other relevant data and statistics;
- Use cost-benefit analysis to review financial requests, assess program trade-offs, and explore alternative funding methods;
- Examine a proposed budget for completeness, accuracy, and conformance with established procedures and organizational objective;
- Consult with management to ensure the proposed budget plan is consistent with promoting the organization’s financial goals;
- Periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified; and
- Recommend program cuts or reallocation of excess funds, as appropriate, to avoid any deficits.

In addition to the proffered position's budget-related duties, the petitioner in its letter of support also stated that the beneficiary would:

[b]e responsible for planning the utilization of sales incentives and personnel to improve the efficiency of the business. She will review and evaluate the operation and determine the areas that require modification or improvement, and then formulate a plan which will provide the most efficient use of the workforce and budget, without sacrificing company sales. [The beneficiary] will conduct feasibility studies on specific business opportunities and establish company costs. She will document standard operating procedures and recommend improvements as deemed necessary to promote an efficient workforce. She will evaluate work methods proposals and develop recommendations to management affecting work methods, wage rates and budget decisions.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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 *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

As the petitioner has identified its proffered position as that of a budget analyst, the AAO turns first to the 2004-2005 edition of the *Handbook* and its discussion of this occupation at pages 72-73. According to the *Handbook*, budget analysts

[p]lay the primary role in the development, analysis, and execution of budgets, which are used to allocate current resources and estimate future financial requirements

[I]n private sector firms, a budget analyst examines, analyzes, and seeks new ways to improve efficiency and increase profits

Budget analysts have many responsibilities in these organizations, but their primary task is providing advice and technical assistance in the preparation of annual budgets. At the beginning of each budget cycle, managers and department heads submit proposed operational and financial plans to budget analysts for review

Based on this description of the employment of budget analysts, the AAO finds the proffered position to include duties typically performed by budget analysts. However, as the position's responsibilities would also

require the beneficiary to analyze and improve the efficiency of the petitioner's business operations, the proffered position reflects the work of management analysts as well, discussed by the *Handbook* at pages 87-89:

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

...

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.

Accordingly, the AAO finds the proffered position's duties to describe employment that combines the work generally performed by budget analysts with that of management analysts. However, while it finds the petitioner to have provided sufficient detail to indicate the tasks to be performed by the beneficiary as a budget analyst, this same level of detail is lacking in its discussion of the proffered position's management analysis responsibilities. As a result, the AAO is unable to determine what duties the beneficiary would perform on a day-to-day basis as a management analyst and will not consider them in its review of the proffered position. To determine whether a particular job qualifies as a specialty occupation, CIS requires a description of the specific duties of that employment. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such a description, the AAO is precluded from determining whether the performance of a position's duties would normally impose a degree requirement on a beneficiary. Accordingly, the AAO finds the petitioner to have established the proffered position as a budget analyst, rather than a budget/management analyst.

The educational requirements for employment as a budget analyst are found at page 73 of the *Handbook*:

Private firms and government agencies generally require candidates for budget analyst positions to have at least a bachelor's degree, but many prefer or require a master's degree Sometimes, a degree in a field closely related to that of the employing industry or organization, such as engineering, may be preferred. Some firms prefer candidates with a degree in business because business courses emphasize quantitative and analytical skills

Therefore, the *Handbook* establishes a degree requirement for employment as a budget analyst. It does not, however, indicate that the degree must be in a field directly related to budget analysis, as required by statute

and regulation. When a job, like that of budget analyst, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *See Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. Accordingly, the petitioner cannot establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel raises concerns regarding the director's analysis of the duties of the proffered position. He asserts that the director not only confused the separate occupations of budget and management analyst, but that CIS should be estopped from denying the instant petition because the director failed to request a more detailed description of the proffered position's duties in his February 5, 2004 request for evidence.

However, the AAO's reading of the director's decision regarding the nature of the proffered position does not find him to have confused the occupations of budget and marketing analyst. Instead, his denial indicates that he determined that the duties of the proffered position combined elements of both occupations. Further, the AAO finds nothing in the record to indicate that the director failed to comply with the regulatory language at 8 C.F.R. § 103.2(b)(8) which governs the issuance of CIS requests for evidence. Regulation requires CIS to request additional evidence only when it determines that information is missing from the initial filing of an application or petition, or that the submitted evidence does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility. In the instant case, neither circumstance is present. Accordingly, the director was not required to issue a request for evidence to obtain additional information regard the duties of the proffered position.

In response to the director's finding that the petitioner's description of the proffered position was generalized and lacking in sufficient detail, counsel, on appeal, contends that this is not the case and submits a copy of a budget analyst job announcement published by the Department of Homeland Security (DHS) as proof that the petitioner's description of the proffered position is more detailed and specific than that provided by DHS' own employment announcements.

While the AAO has found the petitioner to have provided adequate detail regarding the proffered position's budget duties, this finding is based on the expanded description of those duties provided by counsel on appeal. The duties listed at the time of filing were, as analyzed by the director, too general to establish the proffered position as that of a budget analyst. This lack of specificity would not have been overcome by the DHS job announcement submitted by counsel on appeal. The burden of proof in these proceedings is on the petitioner to establish that the proffered position meets one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). A comparison of the petitioner's description of the proffered position with that provided by a DHS job announcement, even if favorable to the petitioner, could not have established that the duties to be performed by the beneficiary are those of a specialty occupation.

On appeal, counsel also contends that the director exceeded his authority in finding that the petitioner did not have the organizational complexity to require the services of a budget/management analyst. While the AAO disagrees with the director's reasoning on this issue in the instant case, it, nevertheless, notes that CIS appropriately considers a petitioner's business operations when adjudicating H-1B nonimmigrant visa petitions.

Section 101(a)(15)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b), requires that an H-1B alien be coming temporarily to the United States to perform services in a specialty occupation. Therefore, to establish a proffered position as a specialty occupation, a petitioner must establish not only that the duties of the proffered position are those of a specialty occupation, but also that it will employ the beneficiary in the position described upon his or her arrival in the United States. To determine whether the petitioner has met its burden of proof in this regard, the AAO appropriately considers the nature of the petitioner's business and whether the proffered position is consistent with its operations, although it does not normally take the size of those operations into account. Were CIS limited solely to reviewing the duties of a proffered position and the beneficiary's qualifications, employers could bring any individual to the United States as an H-1B worker, as long as that individual held a degree required by a specialty occupation and the petitioning employer described the duties of the specialty occupation related to the degree.

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion may qualify it under another of the alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the proffered employment as a specialty occupation under the second criterion – a specific degree requirement is common to the industry in parallel positions among similar organizations or the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – counsel has, in response to the director's request for evidence and on appeal, submitted copies of a total of 13 Internet job advertisements. This documentation does not, however, satisfy the requirements of the criterion's first prong.

Of the 13 announcements, none are published by organizations that can be identified as similar to the petitioner. The positions advertised have been published by two business/management consulting firms, a research organization, two advertising agencies, a supermarket business, five firms that do not identify their operations, and two marketing organizations. Although the petitioner is a marketing firm, the advertisements published by the two marketing businesses do not describe their operations and, therefore, cannot be established as organizations similar to the petitioner. Further, none of 13 advertisements describe positions parallel to the proffered position. Either they do not discuss the duties to be performed by the incumbent or they outline responsibilities different from those described for the proffered position.

The record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(2) – the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. Although counsel, on appeal, contends that the occupation of budget analyst qualifies as a specialty occupation on the basis of its complexity and unique nature, the record contains no evidence to support counsel's assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof in these proceedings. The 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). Therefore, the petitioner has not established the proffered position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(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 submitted a copy of the diploma of one of its business development representatives, the position it contends is most similar to the proffered position. It has also provided a list of its marketing staff, identifying the degrees held by each. This evidence does not, however, satisfy the requirements of the third criterion.

Although the petitioner has submitted a diploma indicating that one of its business development representatives holds a baccalaureate degree, there is no corroborating evidence of the petitioner's employment of this individual. Simply going on record without supporting documentation will not satisfy the petitioner's 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)). Nor does the diploma, which indicates that the individual was awarded a degree in criminology, law and society, and psychology and social behavior, establish that the petitioner requires its employees to hold degrees in fields directly related to their positions, as required to establish the proffered position as a specialty occupation. Moreover, the AAO also notes that this individual is one of a staff of 15 persons identified as business development representatives on the petitioner's organizational chart. Accordingly, documenting the degree held by only one of these individuals does not prove that the petitioner has a practice of hiring degreed business development representatives.

The petitioner's submission of a list of the degrees held by some of its marketing staff also fails to establish the proffered position as a specialty occupation under the third criterion. While the list offers evidence that the petitioner employs degreed individuals in a range of positions, it, like the diploma just discussed, does not indicate that the degrees held by these employees are directly related to their employment. Instead, it shows the petitioner's human rights director and CFO with a degree in film studies, its director of client accounts with a degree in photography, two data collection specialists with degrees in animation and English respectively, a data entry worker with a business administration degree, a senior business executive with a degree in electronics, and two business development representatives with degrees in psychology and history respectively. Only the vice president of sales appears to hold a degree directly related to his work, a business administration degree, with an emphasis on marketing. Therefore, although the record indicates that the petitioner has a practice of employing degreed individuals in positions comparable to the proffered position, it does not establish that the petitioner requires the degrees held by its employees to be in fields directly related to their employment, as required to establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To qualify a proffered position as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must establish that the nature of the position's 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. While, on appeal, counsel asserts that the responsibilities of a budget analyst establish the proffered position as a specialty occupation, the proffered position's budget duties establish only that such employment normally requires a degree, not a degree in a directly-related field, as required for classification as a specialty occupation. Therefore, the AAO has reviewed the record to

determine whether the proffered position imposes not only a degree requirement on the beneficiary, but one in a field directly related to the duties of a budget analyst.

At the time of filing, the petitioner's letter of support initially indicated that the proffered position of budget analyst required an individual with an educational background in finance, but subsequently stated that the beneficiary's degree in business administration, with a major in marketing and international business, provided the knowledge necessary to perform the position's duties. The AAO does not, however, find a degree in business administration, with a major in marketing and international business, to be a degree directly related to the financial duties described at the time of filing and on appeal, which require the beneficiary to analyze the petitioner's accounting records, and to develop and monitor its budget. In light of the petitioner's willingness to accept the beneficiary's degree, the record does not establish that the proffered position's duties, however specialized and complex, require a degree in a directly related field. Accordingly, the proffered position may not be established as a specialty occupation under the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO notes that the record contains evidence that the beneficiary is currently the beneficiary of an H-1B petition filed by another petitioner. CIS approval of a prior Form I-129 on behalf of the beneficiary does not, however, provide a basis for approving the instant petition. 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).

For reasons related in the preceding discussion, 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.

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