

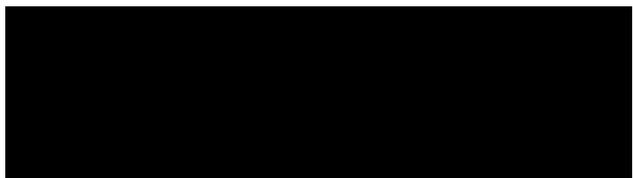
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U.S. Citizenship
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Services

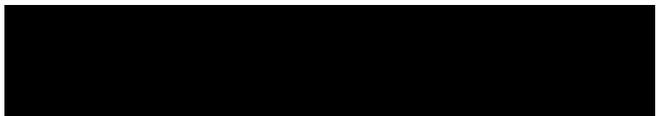
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FEB 05 2005



FILE: WAC 03 057 50339 Office: CALIFORNIA SERVICE CENTER Date:

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:

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 director of the 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 involved with healthcare services, business rentals, and investments. It seeks to employ the beneficiary as a management consultant. The petitioner, therefore, 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 submits a brief and additional evidence.

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.

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 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 proceeding 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) Form I-290B and 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 consultant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail analyzing and advising on the company's managerial method and conducting studies to determine the effectiveness of management policies and programs; assessing and proposing improvements to existing systems and operational procedures; and planning the reorganization of the company's operation. The petitioner's October 31, 2003 letter stated that the beneficiary will research, develop, and design a system of control over income and expenses; work with division managers to collect, review, and analyze operational data or information; determine resources and issues with projects; and assist in implementing proposals. As described by the petitioner, the beneficiary will supervise the company's accountant, marketing manager, human resource director, and division managers. The petitioner's letter stated that a candidate must possess a bachelor's degree in business administration with a major in management, and one year of experience, and the petitioner's job posting indicated that candidates must have a bachelor's degree in business administration or commerce, and one year of experience.

The director determined that the proffered position was not a specialty occupation because it has general managerial duties that do not require professional skills. Referring to the decision in *Matter of Caron International, Inc.*, 19 I&N Dec. 791 (Comm. 1988), the director stated that the case held that general managerial positions are normally not considered professional endeavors requiring specific academic degrees, and that managers are not a members of the professions unless the person qualifies for, and intends to work in, a professional occupation requiring a bachelor's degree. The director stated that managers or executives who supervise employees who work in specialty occupations are generally considered members of a specialty occupation. The director found discrepancies in the submitted evidence, and cited the opinion in *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988) to state that the petitioner must submit independent evidence to resolve inconsistencies in the record.

On appeal, the petitioner states that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. The petitioner asserts that it normally requires a bachelor's degree for the proffered position, and the proposed duties are complex and require a professional degree related to business. Referring to the director's statement, that a manager or executive who supervises employees who work in specialty occupations is generally considered a member of a specialty occupation, the petitioner contends that the proffered position is a specialty occupation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The petitioner asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the California Service Center in the prior case. In the

absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by the petitioner are not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.

Further, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve 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). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required 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). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO next 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 in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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 often considered by CIS when determining these criteria include: whether the *Handbook* 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

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 consultant, 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 specificity the beneficiary's duty to "provide advice on the managerial method of the company," and "[d]etermine what resource will be required and anticipate problems to be encountered on a project." The problems that the management consultant will address are also described by the petitioner without any specificity. The problems encompass broad, generalized areas such as internal control, accounting, finance, human resources, payroll, inventory, staff scheduling, personnel development and training, knowledge management, and decisions about investment.

According to the Form I-129 petition, the petitioner has 34 employees. The petitioner's organizational chart revealed that it has an accountant, a marketing manager, a purchasing manager, an operations manager, and a human resource manager. Three of the managers are shown as supervising staff, though the petitioner does not indicate the number of staff supervised or the duties of the managers and their staff. The AAO concurs with the director's statement that information in the organizational chart conflicted with the DE-6 forms: the organizational chart listed persons that are not shown on the DE-6 forms, and many employees shown on the DE-6 forms are not listed in the organizational chart. According to the petitioner, the beneficiary will supervise the human resources director, [REDACTED] yet, this employee is not listed in the DE-6 forms. Thus, the petitioner's contention that the proffered position is a specialty occupation because the beneficiary will supervise employees who work in specialty occupations is weak. 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. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Although the petitioner had an opportunity to resolve these inconsistencies on appeal, it did not do so. Consequently, the evidentiary weight of the submitted evidence is greatly diminished.

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, management analyst.

The AAO points out that 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 34 employees that provides property management, food service, and retail and staffing services, 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.

There is no evidence in the record to establish the second criterion - that a specific 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. Again, the evidence in the record does not depict the duties of the proffered position as rising to those of a management analyst as described in the *Handbook*.

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 degree or its equivalent for the position.

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. Accordingly, the AAO shall not disturb the director's denial of the petition.

Although the director found that the proffered position did not qualify as a specialty occupation because it was managerial in nature, the AAO notes its authority to affirm decisions which, though based on incorrect grounds, are deemed to be correct decisions on other grounds within our power to formulate. *Helvering v. Gowran*, 302 U.S. 238 (1937); *Securities Com'n v. Chenery Corp.*, 318 U.S. 86 (1943); and *Chae-Sik Lee v. Kennedy*, 294 F. 2d (D.C. Cir. 1961), *cert. denied*, 368 U.S. 926.

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.