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U.S. Citizenship
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Services



DA

MAR 27 2005

FILE: WAC 02 271 53285 Office: CALIFORNIA SERVICE CENTER Date:

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:
[Redacted]

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

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 engaged in the import, retail and wholesale distribution, design, and manufacturing of men's designer clothing and accessories. It seeks to employ the beneficiary as a management analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief and additional documentation, including letters from similar businesses concerning their degree requirements and new Internet job postings.

The AAO will first address the director's conclusion that the position is not 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.

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 analyst. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's August 12, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: determining what resources will be required and what problems may arise in the pursuit of opportunities; estimating the cost, scope, and staffing requirements of proposals; interviewing managers and hiring new employees; examining ways to improve the organizational structure, efficiency, and profits; developing marketing and business strategies; developing and implementing new cost-based and market-driven pricing models and strategies; advising top management regarding the feasibility of new business opportunities; planning, designing, and researching economic trends and market demands; identifying and evaluating inter-company foreign transfer pricing policy options with integrated worldwide distribution facility; analyzing, planning and coordinating sales programs, and identifying and coordinating marketing services; directing and managing trade shows and promotional programs; and managing overall performance of the petitioner's salesmen. Although not explicitly stated, it appears that the petitioner requires a baccalaureate degree or its equivalent in business administration for the proffered position.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is that of a management analyst, a position that requires a bachelor's degree in management or an equivalent thereof. Counsel states further that the record contains supporting documentation, including letters from similar businesses and Internet job postings, to demonstrate that a management analyst position requires such a degree.

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 AAO turns first 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; 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 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 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of a strategic management analyst, a position that is primarily found in management, scientific, and consulting firms, in computer systems design and related services firms, and in Federal, State, and local governments. The beneficiary's job duties do not entail the level of responsibility of a strategic management analyst. Rather, the

proffered position is primarily that of a marketing manager. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree, or its equivalent, is required for a marketing manager job.

Counsel's comments in his April 10, 2003 letter regarding the type of credentials required for the proffered position in the petitioner's industry are without merit. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaighbena*, 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). Furthermore, although counsel submits curricula from various universities, observing that a bachelor's degree in management is sufficient to perform the duties of a management analyst, such an observation has no relevance to these proceedings. The director concluded correctly that the proffered position is not one of a management analyst and, therefore, it does not require a baccalaureate degree, or its equivalent, in a specific specialty.

On appeal, counsel submits two letters or "certifications" from businesses related to the garment industry. Neither writer, however, specifically addresses a management analyst position. Furthermore, much of the text of the letters is identical. Therefore, it is questionable whether the views expressed are those of the writers. Thus, the letters have no relevance.

The petitioner also submits Internet job postings for a business analyst and a retail trend development specialist. The positions, however, do not require a bachelor's degree in a specific specialty. Thus, the advertisements have no relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. As the record indicates that the proffered position is a new position, the petitioner, therefore, has not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

The director also found that the proffered position is not bona fide and, therefore, that the proffered specialty occupation does not exist. An H-1B alien is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B). In this case, the petitioning entity states that it is engaged in the import, retail and

wholesale distribution, design, and manufacturing of men's designer clothing and accessories, and has three employees and a gross annual income of \$900,000. The petitioner claims that it will employ the beneficiary as a full-time management analyst. As stated above, the *Handbook* indicates that strategic management analyst positions are primarily found in management, scientific, and consulting firms, in computer systems design and related services firms, and in Federal, State, and local governments. *See the Handbook*, 2004-2005 ed. at 88.

The service center requested that the petitioner submit a detailed description of the beneficiary's proposed duties, the number of employees to be supervised, the petitioner's organizational structure, and the minimum education, training, and experience required to perform the job. Counsel submitted a description of the beneficiary's proposed duties and advised that the petitioner's organizational structure consists of the owner, an accountant, and an application programmer. This information conflicts with the information in the petitioner's August 12, 2002 letter, in which the petitioner's owner states, in part: "[A]lthough our working force is only of three employees, we out source most of our non-necessary jobs such as *accounting*, graphic design, production & shipping." (Emphasis added.) The record contains no explanation for this inconsistency. 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*, 19 I&N Dec. 582, 591 (BIA 1988).

Furthermore, the petitioner claimed in its August 12, 2002 letter that it needs a management analyst because of its exponential growth and estimated its gross annual income as \$900,000. The record contains no documentation in support of this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). In view of the foregoing, the petitioner has failed to establish that it will employ the beneficiary as a full-time management analyst, and that the beneficiary will be coming to perform services in a specialty occupation, in accordance with Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 101(a)(15)(H)(i)(b).

The director also found that the beneficiary was not qualified to perform the duties of the proffered position because he does not hold an advanced degree in a related area. As stated previously, the proffered position is primarily that of a marketing manager. No evidence in the *Handbook* indicates that a baccalaureate or higher degree in a specific specialty, or its equivalent, is required for a marketing manager job. In this case, the beneficiary holds a Bachelor of Arts degree in Philosophy and Letters. The record contains an evaluation from a professor at Seton Hall University in South Orange, New Jersey stating that the beneficiary's foreign degree is the equivalent of a bachelor's degree in philosophy from an accredited U.S. institution of higher education. As such, the petitioner has demonstrated that the beneficiary is qualified to perform the duties of the proffered position. The petition may not be approved, however, because the proffered position is not 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.