



U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



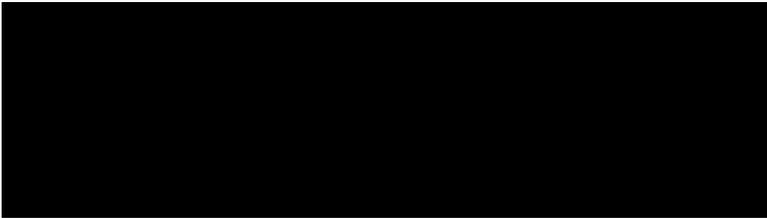
DZ

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 31 2005
WAC 03 086 55266

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 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 supplier of goods and services to the Federal Government, with 35 employees. It seeks to employ the beneficiary as a bidding 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 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 notice of intent to deny; (3) the petitioner's response to the director's notice; (3) the director's denial letter; and (4) Form I-290B, with former counsel's statement. 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 bidding analyst. Evidence of the beneficiary's duties includes: the Form I-129; a January 20, 2003 letter of support from the petitioner submitted at the time of filing; and the petitioner's July 10, 2003 response to the director's notice of intent to deny.

As described by the petitioner in response to the director's notice of intent to deny, the beneficiary would be required to:

- Automate its operations, following an analysis of its business needs; and negotiate with suppliers, manufacturers, traders and producers to meet the requirements of U.S. government agencies, scrutinizing the quantity, quality, size and dimensions, make, model, price and other specifications of ordered materials;
- Electronically search for federal agency orders (through CBDisk) and research prospective suppliers of materials or services required by current or future contracts;
- Review and analyze federal agency orders and identify opportunities to bid; evaluate, assess and clarify existing or projected bids to ensure they are mutually beneficial to the petitioner and the government, that the terms and conditions are in order, profit margins acceptable and supply of materials available and feasible;
- Search the Thomas Register, Internet and directories to coordinate and match orders/bids from customers against suppliers to maintain exact specifications; and maintain good relationships with the manufacturers for repeat orders and future references;
- Contact and negotiate with manufacturers/suppliers to confirm availability, reliability and capacity to deliver orders; obtain the performance bond of manufacturers/suppliers as security in case of delivery failure; communicate with VIPS, presidents, department heads, and business owners for completion of transactions and fulfillment of contract commitments;
- Review and complete all pertinent documents and other federal requirements before submitting bids; prepare reports for management concerning current developments in the market, including innovative business strategies and competitors' movements; and make recommendations to improve company's investment options and business operations;

- Determine cost of purchase orders and prepare itemized expenses before the items are delivered and received by federal agencies; and
- Prepare documents for collection of payments; and assist in the coordination of such functions as bidding procedures, budgeting, order processing, delivery of goods and other contract-related functions.

To determine whether the duties just described 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 identified the proffered position as reflecting the employment of procurement clerks, as described in the 2002-2003 edition of the DOL *Handbook*. The AAO agrees that certain aspects of the proffered position – the preparation of itemized expenses related to purchase orders, the paperwork related to payment collection, the processing of orders – could be performed by procurement clerks. However, it concludes that the proffered position is more closely aligned to the occupation of purchasing managers, buyers, and purchasing agents, as discussed at pages 61-62 of the *Handbook's* 2004-2005 edition:

Purchasing managers, buyers, and purchasing agents seek to obtain the highest quality merchandise at the lowest possible purchase cost for their employers. In general, *purchasers* buy goods and services for use by their company or organization, whereas *buyers* typically buy items for resale. Purchasers and buyers determine which commodities or services are best, choose the suppliers of the product or service, negotiate the lowest price, and award contracts that ensure that the correct amount of the product or services is received at the appropriate time

Purchasing managers, buyers, and purchasing agents evaluate suppliers on the basis of price, quality, service support, availability, reliability, and selection. To assist them in their search for the right suppliers, they review catalogs, industry and company publications, directories and trade journals. Much of this information is now available on the Internet Once all of the necessary information on suppliers is gathered, orders are placed and contracts are awarded to those suppliers who meet the purchaser's needs

Purchasing specialists who buy finished goods for resale are employed by wholesale and retail establishments, where they commonly are known as buyers or merchandise managers Wholesale buyers purchase goods directly from manufacturers or from other wholesale

firms for resale to retail firms, commercial establishments, institutions, and other organizations

The AAO finds the above description of the work performed by purchasing specialists who buy goods for resale by their employers to be closely aligned to the duties of the proffered position. Like a purchasing specialist, the beneficiary would be required to analyze and compare the products and services provided by a range of suppliers, as well as their costs, to determine which should be purchased by the petitioner to meet its contractual obligations to the U.S. Government.

However, while the AAO finds the proffered position generally to fall within the occupation of purchasing managers, buyers and purchasing agents, it notes an anomaly within the duties described by the petitioner – the automation of its operations. In response to the director's notice of intent to deny, the petitioner indicated that 20 percent of the beneficiary's time would be required to analyze the specific needs of its purchasing business and to design the customized programs and databases necessary to automate its operations. This responsibility falls outside the work of purchasing specialists. Instead, it appears more in line with the employment of computer systems analysts who are described at page 106 of the *Handbook* under the occupation of computer systems analysts, database administrators, and computer scientists:

Systems analysts solve computer problems and apply computer technology to meet the individual needs of an organization. They help an organization to realize the maximum benefit from its investment in equipment, personnel, and business processes. Systems analysts may plan and develop new computer systems or devise ways to apply existing systems' resources to additional operations. They may design new systems, including both hardware and software, or add a new software application to harness more of the computer's power.

As the beneficiary's responsibility for the automation of the petitioner's business operations appears to require her to perform in a limited capacity as a systems analyst, the AAO finds the proffered position to combine the duties of a purchasing specialist with those of a systems analyst. Accordingly, it turns to the *Handbook* for its discussion of the educational requirements imposed on these occupations.

At pages 61-62, the *Handbook* states the following with regard to the education required for employment as a purchasing specialist or buyer:

Qualified persons may begin as trainees, purchasing clerks, expeditors, junior buyers, or assistant buyers. Retail and wholesale firms prefer to hire applicants who have a college degree and who are familiar with the merchandise they sell and with wholesaling and retailing practices. Some retail firms promote qualified employees to assistant buyer positions; others recruit and train college graduates as assistant buyers. Most employers use a combination of methods.

Educational requirements tend to vary with the size of the organization. Large stores and distributors, especially those in wholesale and retail trade, prefer applicants who have completed a bachelor's degree program with a business emphasis. Many manufacturing firms put yet a greater emphasis on formal training, preferring applicants with a bachelor's or master's degree in engineering, business, economics, or one of the applied sciences

The *Handbook* discusses educational requirements for computer systems analysts at page 107:

[W]hile there is no universally accepted way to prepare for a job as a systems analyst . . . most employers place a premium on some formal college education. A bachelor's degree is a prerequisite for many jobs; however, some jobs may require only a 2-year degree

. . .

Despite employers' preference for those with technical degrees, persons with degrees in a variety of majors find employment in these computer occupations. The level of education and type of training that employers require depend on their needs

Most community colleges and many independent technical institutes and proprietary schools offer an associate's degree in computer science or a related information technology field

In response to the director's notice of intent to deny, the petitioner contended that the *Handbook's* discussion of employers' preference for purchasing specialists/buyers with baccalaureate degrees establishes the proffered position's degree requirement. The AAO does not agree. While the *Handbook* indicates that employers hiring both purchasing specialists and systems analysts may prefer to hire applicants who have college degrees, employer preference is not synonymous with the normally required language of the first criterion. Employer preference indicates only that employers find degrees desirable. It is, therefore, insufficient to establish that a baccalaureate or its equivalent is "normally the minimum requirement for entry into the particular position."

In that the *Handbook* states that individuals seeking work as purchasing managers, buyers and purchasing agents may be hired on the basis of experience and also indicates no specific degree requirement for computer systems analysts, 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).

On appeal, former counsel expands upon the beneficiary's role within the petitioner's business. He asserts that the petitioner not only seeks to hire a professional who would be responsible for the smooth implementation of different aspects of its bidding and contracting operations, but that the beneficiary would also be relied upon to set up effective and efficient systems to implement others services like billing and collections, and budget planning and control. As described by counsel, the beneficiary would have "a direct hand in managing the operations of the business, and all its future branches, and in participating actively in the establishment of brand-new short and long range programs geared towards achieving targeted production, future capital outlays, and aggressive business ventures in general."

The AAO will not, however, consider former counsel's assertions regarding the beneficiary's managerial role within the petitioner's operations, as these responsibilities materially alter the nature of the employment described by the petitioner at the time of filing. 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. The petitioner must establish that the position offered to the beneficiary

when the petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978).

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) – a 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. It finds the petitioner to have submitted no evidence to establish either that a baccalaureate degree is the norm for a bidding analyst within its industry or that the position itself is so complex that its performance requires a degreed individual. Accordingly, the proffered position cannot be established as a specialty occupation under the second criterion.

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 response to the director's notice of intent to deny, the petitioner stated that it is its practice to hire degreed individuals and listed three employees who hold baccalaureate degrees, two with degrees in business administration and the third with a bachelor of science degree in pharmacy. The petitioner's statements do not, however, satisfy the requirements of the third criterion.

Although the petitioner has asserted it has a practice of employing degreed individuals, it has submitted no evidence to support its claims, i.e., payroll documents or tax forms identifying these individuals as its employees and/or an organizational chart establishing their roles within its organization. Further, the record contains no documentation of the undergraduate degrees awarded to the three employees, e.g., diplomas or letters of confirmation issued by the academic institution each attended. Simply going on record without supporting documentary evidence is not sufficient for the 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 AAO also notes the disparate nature of the degrees, in pharmacy and in business administration, would not prove a degree requirement in a specialty.

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 notice of intent to deny, the petitioner claimed that the duties of the proffered position were "so intricate and sensitive that the candidate who should perform them should be equipped with the necessary academic preparedness." It further stated that the "rock bottom results of the beneficiary's functions would serve as the basis for our business survival, investment decisions and for the realization of [its] planned expansion of operations to more U.S. government Federal Agencies in the future. In which case, even the smallest misrepresentation of essential information could mislead us into taking erroneous investment priorities."

However, the petitioner offered no discussion of how the duties of the proffered position of purchasing specialist/systems analyst, were related to its investment decisions or its operational expansion, nor did it offer any documentation to establish the proffered position's complexity beyond that provided by its listing of the position's duties. Based on the record before it, the AAO does not find the duties of the proffered position to require the beneficiary to have a higher degree of knowledge and skill than would normally be expected of purchasing agents or computer systems analysts who work in a range of complex and technical businesses. As a result, the proffered position is not characterized by the specialization and complexity that would satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel contends that, in denying the instant petition, the director erred when he failed to consider the requirements of the petitioner with regard to the proffered position. He cites the findings of *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) and the unpublished decision in *Matter of Unico American Corp. v. Watson* ___ F. Supp. ___ CV No. 896958 (C.D. March 19, 1991) in support of his position.

While the AAO acknowledges the petitioner's desire to hire a degreed individual to perform the duties of the proffered position, it is not the petitioner that dictates whether a position qualifies as a specialty occupation under Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1). 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. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Further, counsel's claims regarding the findings of the cases he references are not supported by the record. Counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those addressed in these decisions. Moreover, in contrast to the broad precedential authority of the case law of a U.S. circuit court, the AAO is not bound to follow the public decision of a U.S. district court in cases arising within the same district. See *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). The reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO; however, the analysis does not have to be followed as a matter of law. *Id.* At 719. In addition, as the published decisions of the district courts are not binding on the AAO outside of that particular proceeding, the unpublished decision of a district court would necessarily have even less persuasive value.

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.