

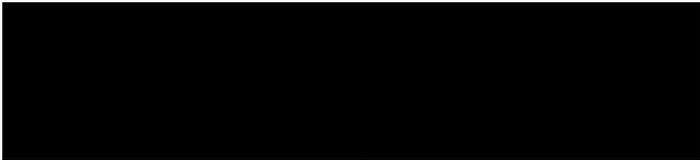
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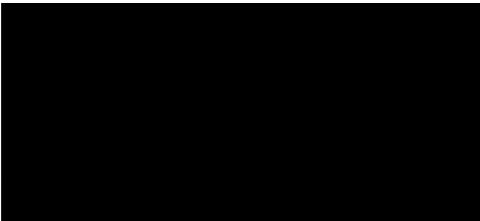


FILE: WAC 04 062 51953 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

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 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 plumbing company that seeks to employ the beneficiary as a total quality management specialist. 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.

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 total quality management specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary will solve organizational, operational, accounting, and managerial problems; analyze data and variables to develop systematic approaches for assuring high quality services; analyze operations and clients; determine and implement promotional methods; improve staff efficiency; organize and document findings of studies and prepare recommendations for implementation of new systems, procedures, or organizational changes; install new systems; conduct operational effectiveness reviews to ensure that functional or project systems are applied and functioning as designed; develop or update functional and operational manuals, outlining established methods of performing work; communicate programs to employees; and monitor training and results of new programs. The petitioner's May 20, 2004 letter indicates that it requires "education in business management" for the proposed position.

When determining whether a position qualifies as a specialty occupation, the director stated that he considers the duties of the proposed position and the nature of the petitioner. The director found that many of the proposed duties reflect those of an operations research analyst as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reveals that that occupation is a specialty occupation. However, the director was not convinced that the beneficiary would actually perform the claimed duties. The director stated that sole reliance on a list of duties resembling those of an operations research analyst taken from the *Handbook* or other governmental publication is misplaced as each position is evaluated based on the nature and complexity of the job duties; that performing incidental specialty occupation duties is insufficient to qualify a position as a specialty occupation; and that the beneficiary's degree in a related area does not guarantee the position is a specialty occupation. The director found that the petitioner was not in the type of industry that the *Handbook* describes as employing an operations research analyst on a full or part-time basis for a significant period of time. The director also found the petitioner did not have the organizational complexity to require the services of an operations research analyst as the petitioner did not have a research division, department, team or staff to act upon the recommendations of an operations research analyst. The director stated that the evidence did not show that the job offered could not be performed by a person whose educational training fell short of a baccalaureate degree.

On appeal, counsel states that the director found that the proposed position is a specialty occupation; but denied the petition on the belief that the beneficiary will not perform the proposed duties. Counsel cites to a prior AAO case, and asserts that in the case the AAO states that there is no concept of "speculative employment" in the statute or regulations. Counsel claims that the director is speculating that the beneficiary will not be performing the proposed duties because of the petitioner's size and is discriminating against the petitioner based on its operations and size. Counsel maintains that the petitioner meets the definition of an employer under 8 C.F.R. § 214.2(h)(ii). Counsel discusses AAO cases dealing with company ownership.

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 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; 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 *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)).

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.

In the denial letter, the director questioned the petitioner's need for an operations research analyst. The AAO does not agree with the director's conclusions regarding the industries in need of operations research analysts. Based on the discussion of the occupation in the 2004-2005 edition of the *Handbook*, it indicates that such analysts exist in almost every industry. However, the AAO does share the director's concerns regarding the employment that has been described by the petitioner.

The *Handbook* describes an operations research analyst as having managers describe the symptoms of a problem to the analyst, who then formally defines the problem. Operations research analysts study problems, breaking them down into their components. They gather information about each component from a variety of sources. With the relevant information in hand, they select the most appropriate analytical techniques such as:

[L]inear and nonlinear programming, dynamic programming, queuing and other stochastic-process models, Markov decision processes, econometric methods, data envelopment analysis, neural networks, expert systems, decision analysis, and the analytic hierarchy process. Nearly all of the techniques, however, involve the construction of a mathematical model that attempts to describe the system studied. The use of models enables the analyst to assign values to the different components and clarify the relationships among them. The values can be altered to examine what may happen to the system under different circumstances.

Counsel states that the director found that the proposed position is a specialty occupation; that of an operations research analyst. The AAO finds that the proposed position differs from an operations research analyst, however. In the job description, the petitioner does not indicate that the proposed position entails using any of the described analytical techniques even though such techniques are the *sine qua non* of an operations research analyst. The petitioner describes the proposed duties in generalized, generic terms that do not establish the nature and level of knowledge that the beneficiary would have to apply. The petitioner has three employees, two of which provide services as plumbers. In the job description the petitioner does not describe with any detail the organizational, operational, accounting, and managerial problems experienced with three employees; the data and variables that will be analyzed to develop approaches to assure quality services; the operations of the three employees that will be analyzed; the studies that will be prepared for new systems, procedures, or organizational changes; the new systems that will be installed; and the operational effectiveness reviews and the functional or project systems that will be applied. This deficiency is not cured by any of the documents that the petitioner has submitted into the record including company brochures, tax records, the organizational chart, photographs, and the petitioner's contactor's license. Accordingly, the petitioner has not substantiated that the beneficiary would actually perform the services of an operations research analyst as that occupation is described in the *Handbook*.

The AAO's conclusion that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, is based on the evidence in the record.

The petitioner submits no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not established the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position as so complex or unique that it can be performed only by an individual with a degree. Neither the job description as delineated by the petitioner nor the submitted evidence establishes the nature and level of knowledge that is required for the proposed position. Accordingly, the petitioner has not shown that the beneficiary would actually perform the services of an operations research analyst as that occupation is described in the *Handbook*. The petitioner, therefore, fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) the petitioner must establish that 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 in a specific specialty. As already discussed in this decision, neither the description of the proposed position nor the submitted evidence establishes the nature and level of knowledge that is needed for the proposed position. As such, the petitioner has not shown that the beneficiary would actually perform the services of an operations research analyst as

that occupation is described in the *Handbook*. The petitioner, therefore, fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 on this ground.

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.