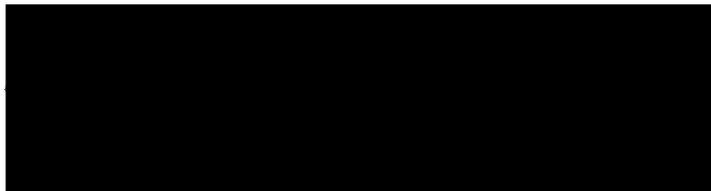


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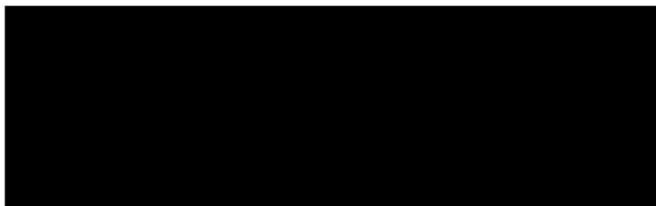
FILE: WAC 04 216 54252 Office: CALIFORNIA SERVICE CENTER Date: **NOV 28 2006**

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:



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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
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 an internet kiosk management company that seeks to employ the beneficiary as a financial analyst. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 on the basis of his determination that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the 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) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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:

[A]n 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 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 proposed position.

According to the petitioner's July 29, 2004 letter of support, the duties of the proposed position would include directing and coordinating all accounting activities on the business; determining the soundness of the petitioner's operations; analyzing the petitioner's finance and profitability versus its marketing efforts; preparing management reports, budget and cash flow projections for the information of management; preparing reports based on present and future operations; performing internal audits; preparing reports for management; and assisting in the preparation of quarterly and yearly tax reports.

In his December 22, 2004 response to the director's request for additional evidence, counsel stated that the duties would include providing guidance to the petitioner's management in its corporate decision-making and business strategies by reading and analyzing financial reports; researching and analyzing related financial markets; conducting financial research into market data regarding other public internet access providers, as well as the financial performance of public internet access providers in different market locations, and preparing reports relating to the petitioner's financial status in relation to each market; monitoring industry trends; developing forecasts; researching any new and developing regulations influencing the petitioner's operations and financial options; reviewing data and corresponding short- and long-term economic analyses regarding the financial parameters of the company vis-à-vis project requirements; making recommendations with regard to the financial needs of the company; making recommendations to management regarding potential financial impact of industry trends and forecasts; and assisting in the petitioner's business plan for prospective lenders, venture capitalists, and investors.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. In denying the petition, the director stated that the proposed duties are not so specialized and complex as to require a bachelor's degree. Citing to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the director noted that the minimum requirement for entry into the field was not a degree in a specific specialty.

On appeal, counsel states, in part, that the director erred in denying the petition, as his analysis did not focus on whether the job duties resemble those of a financial analyst, as that position is described in the *Handbook*, and whether the performance of those duties requires a bachelor's degree. Counsel cites to a court decision to state that the nature of the petitioner's business should not be a factor in deciding whether the position is a specialty occupation. Counsel further states that a baccalaureate degree is normally the minimum entry requirement for financial analyst positions, that this degree requirement is industry-wide, and that the specific duties of the position are so complex that their performance requires a baccalaureate or higher degree.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position. It 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 minimum of a baccalaureate degree in a specific specialty 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 AAO agrees with the director's finding that the proposed position does not qualify for classification as a specialty occupation. At the outset of its analysis, the AAO notes inconsistencies and deficiencies in the record. The Form I-129, which was signed by the petitioner's general manager on July 29, 2004, states that the petitioner was established in 2004, has eight employees, and has an estimated gross annual income of \$3,000,000. The petitioner's July 29, 2004 letter of support states that it has over twenty commissioned agents. The record, however, contains no evidence to support the claims of eight employees and twenty commissioned agents, and the September 30, 2004 quarterly wage report reflects five employees. According to counsel's December 22, 2004 response to the director's request for evidence, co-signed by the petitioner, this quarterly wage report is from the petitioner. However, the AAO notes the quarterly wage report is not in the petitioner's name, and the taxpayer identification number listed on this form does not correspond to the taxpayer identification number provided on the Form I-129. The record contains no explanation for these inconsistencies. 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). 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. *Id.* at 591-92.

Nor does the record contain any evidence to support the petitioner's assertion that it would earn \$3,000,000 in 2004, or that it manufactures internet kiosks, as claimed in its July 29, 2004 letter of support. Further, although the petitioner asserts in the December 22, 2004 response to the director's request for evidence that the petitioner, then operating from a residence, was currently negotiating a business lease (a copy of which would be provided upon its finalization), the record contains no such lease. Simply going on record without supporting documentary evidence is not sufficient for 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)).

As noted previously, the AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Although the *Handbook* indicates that a position as a financial analyst normally qualifies for classification as a specialty occupation, the AAO record does not establish that the beneficiary will be employed as a financial analyst. Counsel and the petitioner have limited their descriptions of the proposed duties to exclusively vague terms that convey neither the content of the work that the beneficiary would actually perform nor that the actual work performance would involve the critical and practical application of a bachelor's degree-level of knowledge in a specific specialty, as required by the statute and regulations to establish a proposed position as a specialty occupation.

For example, in his response to the director's request for additional evidence, counsel states that the beneficiary will research issues such as business expenditures, costs, billing, market performance, and potential investments, and assist in the preparation of the petitioner's business plan for prospective lenders, venture capitalists, and investors. Such a description of the duties consists of generalized

functions that do not establish the level of knowledge that would be required when they are actually performed in the context of the petitioner's business matters, matters about which the record contains little substantive information.

In response to the director's request for evidence the petitioner submitted a copy of its business plan dated October 1, 2004 with projected and possible rollout dates of kiosk locations over 30 months. As of the date of the business plan, the petitioner stated that it intended to deploy an additional 500 terminals by December 2004 and 3,500 more by 2006. There is no evidence in the record indicating that any of these acquisitions had occurred as of the February 2005 filing date of the appeal. While the profit and loss statements reflect a net income of \$704,229.59 as of July 31, 2004, no evidence of record supports these figures, and the year-end financial statements were not submitted on appeal. Going on record without supporting documentary evidence is not sufficient for the purpose 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)).¹

A petitioner cannot establish its employment as a specialty occupation by simply describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a financial analyst analyzes financial information to forecast the future financial position of the company. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. It lacks substantive information about the specific work and the associated knowledge requirements of the particular position that the petitioner is proffering. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests. Otherwise, the petition lacks a reasonable basis for the AAO to evaluate the merits of the petitioner's claim that the beneficiary will perform work that requires the theoretical and practical application of a body of highly specialized knowledge in a specific field and the attainment of a bachelor's degree or higher, or its equivalent, in a specific specialty, as required by statute and CIS regulations.

The *Handbook* indicates that financial analysts provide analysis and guidance to businesses and individuals to help them with their investment decisions. They assess the economic performance of companies and industries for firms and institutions with money to invest. The petitioner is an internet kiosk management company with eight employees. There is no indication in the record of the kinds of investment decisions that the financial analyst would assist the petitioner in making. Nor has the petitioner offered any information regarding the amount of funds available to invest. Again, simply going on record without supporting documentary evidence is not sufficient for 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)).

Accordingly, the AAO finds that the petitioner has not established the proposed position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(A) – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

¹ A google search of Now Right Now in Brea, California does not reveal any activity other than the Coyotenet Communications Group 2004 press release announcing its joint venture with the petitioner, combined with the business plan. NowRightNow.com is a one-page site that does not reflect any recent activity.

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the job postings submitted by counsel on appeal. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

There is no information in the record to demonstrate that the companies advertising are similar in size or scope of operations to the petitioner. Again, simply going on record without supporting documentary evidence is not sufficient for 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof.

As noted previously, the petitioner is an internet kiosk management company with eight employees. Amdocs is a billing and CRM software products and services provider. The unnamed company advertising its vacancy through Monster.com is a financial services company, and no information was submitted regarding the business operations of Net.com or Work N Gear. The AAO, therefore, has no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner. Moreover, these three advertisements provide too little information regarding the duties of the positions to allow the AAO to undertake a meaningful analysis as to whether the positions are in fact "parallel" to the position proposed here. The fact that these positions share the same title as the petitioner's proposed position does not mean that they are in fact parallel positions. Finally, the AAO notes that four postings are too few to establish an industry-wide standard. Accordingly, the proposed position does not qualify for classification as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of this regulation requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. For reasons already set forth in this decision, particularly the petition's inconsistencies, deficiencies, and generalities, the nature of the duties of the proposed position as set forth in the petition does not support such a finding.

Therefore, counsel has not established that the proposed position qualifies for classification as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this 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. However, this is a newly-created position, which precludes approval under the third criterion. Accordingly, the proposed position does not qualify for classification as a specialty occupation under the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires the petitioner to establish that the nature of the specific duties of its 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. The AAO incorporates its previous discussion regarding the petition's inconsistencies, deficiencies, and generalities. To the limited extent that they are described, the proposed duties do not indicate the specialization and complexity required by this criterion. As a result, the record fails to establish that the proffered position meets the specialized and complex threshold set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, the AAO notes that the beneficiary is currently in H-1B status. However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous petition was approved based upon the same evidence contained in this record, its approval would constitute 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director did approve a nonimmigrant petition similar to the one at issue here, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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.