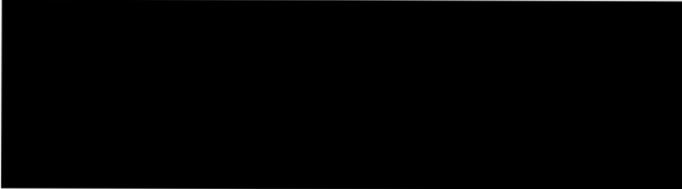




U.S. Citizenship
and Immigration
Services

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY



D2

FILE: WAC 04 011 51398 Office: CALIFORNIA SERVICE CENTER Date: OCT 06 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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
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 wholesale distributor of auto parts, with five employees. It seeks to employ the beneficiary as a financial 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 record failed to establish the proffered position as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief and additional documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the 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 financial analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s October 8, 2003 letter of support; and counsel’s April 23, 2004 response to the director’s request for evidence. This evidence asserts that the responsibilities of the proffered position would require the beneficiary to:

- Interpret data concerning price, yield, stability, and future trends in investment risks and other economic factors which influence the sale and distribution involving the automotive parts industry;
- Develop and monitor operating and capital budgets requirements, preparing financial analyses and forecasts, and analyzing operation[al] activity costs to recommend cost containment measures;
- Assist in production of monthly forecast of operating revenue and expenses for the division by analyzing current month-to-date results compared to the business plan and prior year actuals;
- Assist in pricing analysis, prepare journal entries and assist in month-end close reporting and operating results analysis;
- Analyze past and present financial operations, trends and costs as well as estimated and realized revenues, to prepare budget and project future revenues and expenses;
- Assist in the reconciliation of forecast-vs-actual amounts. Create financial models to aid in business decision-making;
- Interpret financial data to advise management on matters involving effective use of resources and budget forecasts;

- Prepare financial and cost analysis reports to recommend courses of action;
- Produce and analyze various databases of key operating statistics to be used in implementing area operating strategies and in the development of operational goals/objectives; and
- Work on special projects with cross-functional teams within the organization to provide financial and business support on expansion opportunities and proposals[.]

As reflected in the above list, the petitioner limits its information about the proffered position to exclusively generalized terms that do not relate to the specific work that the beneficiary would perform and do not establish the types and level of knowledge that such work would require.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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 *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 indicated that he did not find the record to establish that the beneficiary would be employed as a financial analyst by the petitioner, determining that financial analysts were not employed by wholesale distributors of auto parts. He further concluded that the record failed to establish the proffered position as a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). While, as discussed below, the AAO agrees that the record fails to demonstrate that the proffered position is a specialty occupation, it does not find the proffered position, based on the duties described by the petitioner, to be that of a financial analyst.

The 2006-2007 edition of the *Handbook* indicates that financial analysts

Financial analysts and personal financial advisors provide analysis and guidance to businesses and individuals to help them with their investment decisions. Both types of specialists gather financial information, analyze it, and make recommendations to their clients *Financial analysts* assess the economic performance of companies and industries for firms and institutions with money to invest [*Handbook* at page 85].

Although on appeal, counsel asserts that the petitioner's long-term business plans and projections will involve creating investment systems and will expose it to a variety of investment opportunities, the duties of the proffered position do not indicate that the beneficiary would provide the type of investment counseling performed by financial analysts. Without documentation 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 Obaigbena*, 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). Instead, the duties noted above appear to be most closely aligned to the employment of budget analysts who:

[p]lay the primary role in the development, analysis, and execution of budgets, which are used to allocate current resources and estimate future financial requirements

Budget analysts can be found in private industry, nonprofit organizations, and the public sector. In private sector firms, a budget analyst examines, analyzes, and seeks new ways to improve efficiency and increase profits

Analysts examine the budget estimates or proposals for completeness, accuracy, and conformance with established procedures, regulations and organizational objectives They also examine past and current budgets and research economic and financial developments that affect the organization's spending. This process enables analysts to evaluate proposals in terms of the organization's priorities and financial resources.

[B]efore any changes are made to an existing program or before a new one is implemented, a budget analyst must assess the program's efficiency and effectiveness. Analysts also may be involved in long-range planning activities such as projecting future budget needs.

The amount of data and information that budget analysts are able to analyze has greatly increased through the use of computerized financial software programs. The analysts also make extensive use of spreadsheet, database, and word-processing software.

Budget analysts have seen their role broadened as limited funding has led to downsizing and restructuring throughout private industry and government. Not only do they develop guidelines and policies governing the formulation and maintenance of the budget, but they also measure organizational performance, assess the effect of various programs and policies on the budget, and help to draft budget-related legislation[*Handbook* at pages 77-78].

However, while the petitioner's description of the proffered position reflects the above discussion, it outlines the type of duties typically performed by budget analysts rather than the specific tasks to be performed by the beneficiary in relation to the petitioner's auto parts distribution business. Therefore, the duties listed for the proffered position do not establish it as a specialty occupation.

To determine whether a position qualifies as a specialty occupation, the AAO requires information regarding the actual responsibilities of a proffered position. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a

day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case offers no description of the proffered position's day-to-day responsibilities in relation to the petitioner's auto parts distribution business, it does not establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

In reaching its decision, the AAO has noted the petitioner's submission of evidence regarding the employment of financial analysts from the Department of Labor's *Dictionary of Occupational Titles (DOT)* and the *Occupational Information Network (O*Net)*, which has replaced it, as proof of the proffered position's degree requirement. However, the proffered position is not that of a financial analyst. Neither are its responsibilities similar to the duties described in the *DOT* and *O*Net* materials. Moreover, neither the *DOT* nor the *O*Net* is a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. They provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. A Specific Vocational Preparation (SVP) rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education and experience, and it does not specify the particular type of degree, if any, that a position would require. A Job Zone rating does not indicate that a bachelor's degree in a specific specialty is required.

The AAO has also reviewed the three Internet advertisements for financial analyst positions submitted by the petitioner in response to the director's request for evidence. Published by a financial staffing firm, a document imaging and office products business and an unidentified employer, two of the listings indicate a degree requirement in accounting or finance, while the third indicates the employer will accept a degree in any academic field. The announcements are, however, of little evidentiary value in these proceedings. The proffered position is not that of a financial analyst and the descriptions of the jobs advertised are too limited to establish them as budget analysts. Moreover, two employment listings are insufficient proof of national hiring practices. The *Handbook*, which indicates that the occupation of budget analyst would not impose a specific degree requirement on the beneficiary, does offer an overview of national hiring practices, drawing on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification or licenses in the field, to reach its conclusions regarding the nation's employment practices.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove (1) that a specific degree requirement is common to its industry in parallel positions among similar organizations or (2) that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the petitioner has submitted no evidence that responds to either of the criterion's prongs. Moreover, the petitioner's failure to provide a specific, detailed account of the proffered position's duties precludes it from establishing the position as parallel to any degreed positions within similar organizations in its industry or distinguishing it from similar but non-degreed employment based on its complexity or unique nature. The record does not demonstrate that the proffered position qualifies as a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

On appeal, counsel contends that whether a degree requirement for the proffered position is common to the petitioner's industry is irrelevant. He asserts that "[t]o deprive [the] Petitioner of the professional services of a Financial Analyst on the arbitrary ground that similarly situated organizations do not normally hire professional in-house Financial Analyst[s] unduly restricts [the] Petitioner's legitimate business plans and judgment to expand and upgrade its services." Counsel's concern regarding the director's consideration of the second criterion in the instant case overlooks CIS' obligation to explore a petitioner's ability to meet the requirements of any of four regulatory criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) before it may conclude that a proffered position does not qualify as a specialty occupation. In that the director determined that the record did not establish the proffered position as a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), he appropriately explored whether it might still qualify as a specialty occupation under another of the other alternate criteria.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(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 whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually 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 the instant case, the proffered position is newly created. In response to the director's request for evidence, counsel stated that it was a "new position, designed primarily to meet the needs of the Petitioner in the conduct of its expanding trade or business." Accordingly, the petitioner has no hiring history with regard to the offered employment. The proffered position is not established as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to prove that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. In the instant case, the petitioner has not provided a description of the specific, day-to-day duties to be performed by the beneficiary on behalf of its auto parts business. Having failed to provide a meaningful description of the duties to be performed by the beneficiary, the petitioner is precluded from establishing the offered employment as a specialty occupation under the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) based on the specialization and complexity of the position's duties.

For the reasons discussed above, the petitioner has failed to establish the proffered position as a specialty occupation. 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 met that burden.

ORDER: The appeal is dismissed. The petition is denied.