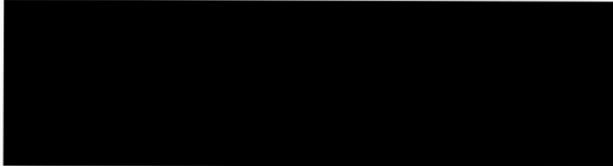


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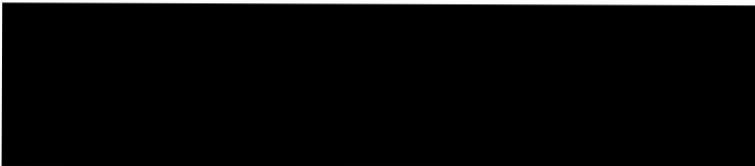
FILE: WAC 04 058 50238 Office: CALIFORNIA SERVICE CENTER Date: **OCT 06 2006**

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 an accounting, investment and management firm, with five employees. It seeks to employ the beneficiary as a management 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 two requests for evidence; (3) counsel's responses to the director's requests; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief, and new and previously-submitted evidence. 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 management analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s December 11, 2003 letter of support and counsel’s May 21, 2004 response to the director’s March 2, 2004 request for evidence. The petitioner indicates that the beneficiary would provide management consultancy services to its clients, requiring him to:

- Analyze operating divisions to make recommendations on improving, revising and modifying organizational structure, work methods, systems and procedures by researching existing methods of accomplishing tasks, using appropriate data collection techniques and designing survey methods;
- Conduct management reviews of unit operations, information flow, integrated production methods and inventory control to identify work problems, program deficiencies and resource waste;
- Write reports on the results of investigations and analyses to provide required information to clients’ management by summarizing findings, identifying problem areas and recommending methods to improve operations;
- Plan, develop and recommend the implementation of new systems, methods and procedures so that anticipated benefits are realized with minimal disruption of operations – preparing bulletins or manual material needed for implementation and providing instructions to operating personnel on new procedures/methods;
- Evaluate strategic marketing opportunities for service development, including analyzing industry market size, segmentation, competition, trends and key activities;

- Prepare work simplification and classification studies and establish operations and procedures manuals to assist clients' management in operating more efficiently and effectively; and
- Perform other related management systems analyses as required.

The petitioner also states that the beneficiary would have responsibility for developing its standard operating procedures, organizational/functional/position charts preparatory to staffing and its performance standards. It indicates that the performance of the above duties would require a baccalaureate or higher degree in the field of business management or business administration, or other closely related field of study.

While the AAO would normally turn to an analysis of whether the above duties are those of a specialty occupation, this analysis must await the AAO's consideration of the reliability of the evidence submitted by the petitioner concerning its business operations. In its letter of support, the petitioner stated its business as that of a "full accounting, investment and management consultancy firm." In response to the director's second request for evidence, counsel expanded upon that statement, indicating that the petitioner provides management consulting services to clients seeking advice on start-up enterprises and strategic management. He also noted that the petitioner's clients include organizations whose systems and procedures are losing focus and need assistance in carrying out a comprehensive review of corporate strategy. Counsel claims that the petitioner has operated as a "CPA and investment and management consultancy" for 23 years. However, the AAO will discount counsel's assertions regarding the petitioner's business operations as the record does not support his statements. Without documentary evidence to support the claim, the assertions of counsel will not meet the petitioner's burden of proof in these proceedings. 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).

The organizational chart submitted in response to the director's March 2, 2004 request for evidence appears to contradict the petitioner's statements regarding the nature of its business. This chart offers no indication that the petitioner currently offers the management consulting services it has described. It shows the petitioner's organization as comprised of six accounting positions, four of which have incumbents; two independent contractor tax preparers; a bookkeeper; a vacant market research analyst position; a vacant employee relations specialist position and the proffered position of management analyst. The duties listed on the chart for the petitioner's accounting personnel are limited to the evaluation, analysis and examination of the financial conditions of the petitioner's corporate, partnership and individual clients. The record provides no evidence that the petitioner's organization has previously offered management consulting services. Accordingly, the petitioner has not established that it operates a business providing management consulting services. It is incumbent upon the petitioner to resolve any inconsistencies in the record with independent objective evidence. Doubt cast on any aspect of the petitioner's proof may 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, 591-92 (BIA 1988).

In that the record does not demonstrate that the petitioner is in the business of providing management consulting services, the petitioner has not established that it would employ the beneficiary as a management analyst to provide those services. As a result, the petitioner has failed to prove the beneficiary would be

coming temporarily to the United States to perform services in a specialty occupation, pursuant to section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1).

The AAO now turns to an examination of the duties of the proffered position, which the petitioner asserts are those of a management analyst.

To make its determination whether the employment described by the petitioner 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)).

As described by the petitioner, the duties to be performed by the petitioner reflect the employment of management analysts who "analyze and propose ways to improve an organization's structure, efficiency, or profits." [*Handbook*, 2006-2007 Edition, page 92]. However, in that the petitioner has not established that it provides management consulting services and would, therefore, employ the beneficiary in the capacity of a management analyst, the AAO will not accept the duties listed in the petitioner's letter of support. Accordingly, the record does not offer a reliable description of the proffered position.

The AAO requires information regarding the specific responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. 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 or specialization to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case offers no reliable description of the proffered position's responsibilities, 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.

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 provided no evidence that responds to either of the criterion's prongs. Moreover, the absence of a reliable description of the proffered position's duties precludes the petitioner from establishing the proffered position as parallel to any degreed positions within similar organizations in its industry or distinguishing it as more complex or unique than similar, but non-degreed, employment.

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. The record, however, offers no evidence of the petitioner’s hiring practices regarding the proffered position, nor does the petitioner state that it has previously employed management analysts, despite its claim that it has been operating as a CPA, investment and management consultancy for 23 years. Accordingly, the proffered position may not be 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 failed to demonstrate the nature of its business operations and, therefore, to establish that its description of the proffered position’s duties accurately outlines the duties to be performed by the beneficiary. As the description of the proffered position cannot be relied upon, the petitioner is precluded from establishing that the duties it has described are of sufficient complexity and specialization to satisfy the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO notes that the basis for its denial of the instant petition differs from that of the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the service center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

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.