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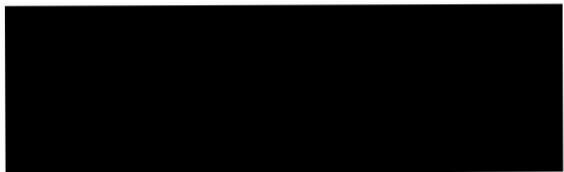
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FILE: WAC 03 154 51032 Office: CALIFORNIA SERVICE CENTER Date: **AUG 05 2008**

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director, California Service Center. The Administrative Appeals Office (AAO) dismissed the subsequently filed appeal and affirmed the director's decision to deny the petition. The matter is now before the AAO on a motion to reopen/reconsider. The motion will be granted and the director's and the AAO's decisions will be affirmed.

The petitioner is a home health care company that seeks to employ the beneficiary as a management analyst. 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 on two grounds: (1) that the petitioner has failed to establish that the proposed position qualifies for classification as a specialty occupation; and, (2) that the beneficiary does not qualify to perform the duties of a specialty occupation.

In a decision dated March 22, 2006, the AAO affirmed the director's decision and dismissed the appeal. On April 21, 2006, counsel filed a Form I-290B and identified it as a "Motion to Reopen and Reconsider." On motion, counsel contends that the position of management analyst for the petitioner qualifies as a specialty occupation. The petitioner submits a brief in support of the motion to reopen/reconsider, and submits an opinion letter to support its position that the duties of management analyst with the petitioner are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate degree.

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.

To determine whether a particular position qualifies as a specialty occupation, CIS does not simply rely on the position’s title. The specific duties of the proposed 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 proposed 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.

On motion to reopen/reconsider, counsel for the petitioner reiterates the same job duties submitted with the original petition. The duties include, in part, “arrange and coordinate schedules of RN’s, home health aids with clients;” “conduct organization studies and evaluations, design systems and procedures;” “serve as an information manager for the office;” “assist in handling travel arrangements;” “assist in account management;” and, “provide administrative support to the administrator.” **Counsel states that the management analyst is “charged with identifying the problems in the first place. Without those problems having been identified, it is impossible to relate duties to them.”**

Upon review of the job description, the AAO notes that the record does not establish that the beneficiary will be a management analyst and thus the duties are not those of a management analyst as discussed in the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*). In reviewing the break down of the job duties submitted in response to the director’s request for evidence, the beneficiary will spend 20 percent of her time providing general administrative support, 30 percent of her time focusing on accounting and billing; and 50 percent of her time conducting organizational studies and evaluations. The beneficiary will perform half of her time providing administrative support and bookkeeping support. The beneficiary will spend the other half of her time performing duties generally described in the *Handbook* as

those of a management analyst. Although the AAO's decision noted the deficiencies of the duties as described, stated that several of the duties to be performed were not typical for a management analyst, and noted that the job description was general and vague, counsel for the petitioner did not provide on motion a more detailed description of the proffered position. It is still not clear what the beneficiary will do on a daily basis in the proposed position. 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)).

Counsel does not explain the beneficiary's duties in context of the petitioner's business procedures and organizational structure. The record fails to establish that the petitioner's operations are of the scope or complexity to require the services of a management analyst. The proposed job duties include "conduct organizational studies and evaluations, design systems and procedures, conduct work simplifications and measurement studies, and prepare operations and procedures manuals to assist management." However, the petitioner does not explain how the beneficiary will conduct organizational studies and what type of evaluations and reports the beneficiary will prepare. The record provides no background upon which the AAO can analyze whether the duties to be performed are consistent with those of a management analyst. The petitioner has submitted no evidence to describe its operational procedures, including its home care activities. The record contains no documentation, financial or contractual, that identifies the clients for whom the petitioner provides services, the specific services provided or the manner in which those services are provided. Nor has the petitioner submitted substantive promotional or informational materials that describe its business or services. The petitioner provides a basic brochure of the petitioner's services but it fails to explain how the organization runs. As a result, the record, despite the statements made by the petitioner and counsel, does not establish what the beneficiary will be doing on a daily basis in relation to the home health care business, or that the beneficiary will perform the duties of a management analyst. Again, 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. at 165.

In the absence of any evidence to prove that it is engaged in the business activities that it asserts requires the beneficiary's services, the petitioner has not established that it will actually employ the beneficiary as a management analyst. Without evidence of the petitioner's business operations, the duties listed in the record do not constitute a reliable description of the proffered position and will be discounted. While the petitioner has identified its position as that of a management analyst, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention. In establishing a position as a specialty occupation, the petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

In the instant case, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. As previously noted, CIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. However, without a reliable description of the position's daily duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a

body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services.

On motion, counsel for the petitioner submits a professional position evaluation for a management analyst position. The evaluation was completed by [REDACTED], Professor of Marketing, Graduate Program Chair, Department of Marketing, from the Lubin Graduate School of Business at Pace University. The evaluation stated the following:

I have reviewed an outline of the job duties required for the subject position of 'Management Analyst' to be held by the candidate, [the beneficiary]. Furthermore, over the course of the academic and professional experiences summarized above, I have become familiar with the role generally occupied by management analysts. The management analyst must apply a comprehensive, integrated understanding of academic management concepts and administrative methodologies toward the gathering of information and data regarding business operations, workflows, and requirements; the accordant preparation of recommendations for streamlining and modification of operations (with an emphasis on improved efficiency, cost-effectiveness, and the resolution of operational problems); and the general management of business-critical change processes and system implementations.

* * *

It is my opinion that management analysts who will be working at an advanced level in performing the job duties listed above are required to demonstrate academic training in business administration, management, or a related area, at no less than a bachelor's-level, in order to competently execute the required job duties. . . .

Although the evaluator stated that he reviewed an "outline of the job duties" for the position offered to the beneficiary, the evaluation does not have attached the job duties which [REDACTED] relied on to complete this evaluation. In addition, the record does not establish that [REDACTED] reviewed documentation of the petitioner and its organizational structure, its business activities, and its employees, before concluding that the petitioner would employ the beneficiary as a management analyst at an "advanced level" as stated in the evaluation. There is thus an inadequate factual foundation to support [REDACTED] conclusion. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

On motion, counsel cites precedent decisions in support of the contention that a due process violation occurred with the instant petition. Although counsel argues that the petitioner's rights to procedural due process were violated, it has not shown that any violation of the regulations resulted in "substantial prejudice" to them. *See De Zavala v. Ashcroft*, 385 F.3d 879, 883 (5th Cir. 2004) (holding that an alien

"must make an initial showing of substantial prejudice" to prevail on a due process challenge). The petitioner has fallen far short of meeting this standard. A review of the record and the adverse decisions indicates that CIS properly applied the statute and regulations to the petitioner's case. The petitioner's primary complaint is that the director denied the petition. As previously discussed, the petitioner has not met its burden of proof and the denial was the proper result under the regulation. Accordingly, the petitioner's claim is without merit.

Counsel suggests that the director's adjudication of the petition was unfair. The petitioner has not demonstrated any CIS error in conducting its review of the petition. Nor has the petitioner demonstrated any resultant prejudice such as would constitute a due process violation. See *Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986); *Nicholas v. INS*, 590 F.2d 802, 809-10 (9th Cir. 1979); *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974), *cert. denied*, 419 U.S. 1113 (1975).

CIS also denied the petition on the ground that the petitioner did not provide sufficient evidence to establish that the beneficiary is qualified to perform the duties of a specialty occupation. Upon review, the AAO withdraws this part of the decision. At the time of filing, the petitioner submitted an evaluation of the beneficiary's education, prepared by David M. Hardesty, an evaluator for Josef Silny & Associates, Inc. The review of the beneficiary's academic credentials found the beneficiary to hold the equivalent of a U.S. baccalaureate degree in business administration and media studies. The AAO accepts the evaluation of the beneficiary's academic background. Accordingly, the beneficiary is found to hold the equivalent of U.S. bachelor's degree in business administration and media studies, and may be qualified to perform the duties of a related specialty occupation.

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. Accordingly, the motion will be granted, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The previous decisions of the director and the AAO are affirmed. The petition is denied.