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U.S. Citizenship
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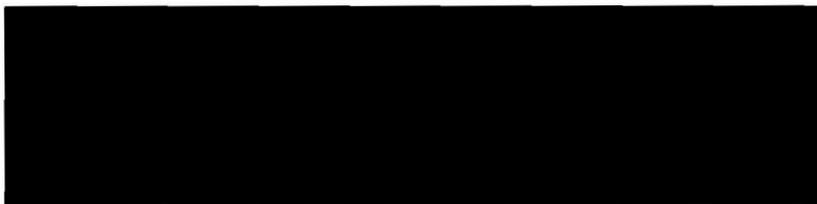


FILE: WAC 07 225 52941 Office: CALIFORNIA SERVICE CENTER Date: **NOV 25 2008**

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.

John F. Grissom, Acting 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 IT technical hardware and software services provider¹ that seeks to employ the beneficiary as a full-time 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, determining that the petitioner had not established that the proffered position is a specialty occupation.

Internet information cited in footnote 1 indicates that the petitioner's business status is suspended. The AAO sent a fax to counsel on October 31, 2008, requesting evidence that the petitioner is operating as a legal entity, and as a courtesy, providing her with five days to respond. However, counsel did not respond and no further documents have been received by the AAO to date. Thus, the record is considered complete.

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

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

¹ The California Business Portal website at <http://kepler.ss.ca.gov/corpdata/> reports the petitioner's status as "suspended." In view of the foregoing, it is not clear that the petitioner is an active company.

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.

In a July 16, 2007 letter submitted in support of the petition, the petitioner described the proposed duties and time allocations of the proffered management analyst position as follows:

1. OPERATIONS MANAGEMENT (30%):

Define the present and potential obstacles of [the petitioner]. Advise management and professional staff on better methods of operations, recruitment and staffing. Work with the Board of Directors and committees to establish policies. Define the petitioner's needs and develop solutions to management and operational problems. Advise management on alternative methods of solving organizational problems and recommend the implementation of new and modified systems of operations and organizational set-up. Ensure that standards and procedures criteria are met to enhance the petitioner's staffing procedures and major operations.

2. MANAGEMENT ANALYSIS (30%):

Analyze a business problem from various angles and develop preliminary hypotheses for its cause, study the business organization, operations, customers or competition to test his hypotheses, and then recommend or implement a solution. Introduce processes to improve efficiency and reduce operating costs; promote a system framework for business requirement definition; and assist with process redesign inherent with the implementation of new operating procedures.

3. ADMINISTRATIVE / HUMAN RESOURCES (20%):

Oversee and direct Human Resources and organizational activities, and build strong support and practices in the areas of employee relations, staffing, performance management, training, organizational development, compensation and benefits support along with labor relations. Direct, manage, and deliver core human resources management programs and services. Consult with senior management to identify and resolve organizational issues and anticipate needs to help proactively manage growth and change, and to optimize efficiency and productivity. Develop a human resource account management concept to create a more useful interface between the petitioner and its clients.

4. PAYROLL AND FINANCE (20%):

Analyze the petitioner's employment and wage administration. Maintain relationships with clients, suppliers, distributors, and professionals in order to determine their staffing requirements, forecast their customer census and project how the petitioner can best respond to their needs. Duties include payroll, health administration, 401K issues, accounting of sick, vacation, personal days, exit interviews, and computer reporting via spreadsheets.

The director denied the petition on the basis of her determination that the petitioner had not submitted sufficient evidence to establish that the petitioner's business processes, products, services, or workforce are of a scope or complexity that would require the services of a full-time management analyst.

On appeal, counsel states, in part, that the position of management analyst qualifies as a specialty occupation under at least three of the four prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, the degree requirement is common to the industry in parallel positions among similar organizations, and 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. As supporting documentation, counsel submits: excerpts from the Management Analysts category in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*; the petitioner's organizational chart; a copy of counsel's response to the director's RFE; and job postings for management analyst positions.

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 turns first 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; 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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of a management analyst, which in private industry may require a master's degree in business administration or a related discipline. See the *Handbook*, 2008-09 edition. On appeal, counsel paraphrases the generic description of the proposed duties listed above. Information on the petition reflects that at the time of filing on July 26, 2007, the petitioner claimed two employees and a gross annual income of \$445,000.00. Given the size of the petitioner's business, it is not clear that a full-time management analyst position is available for the beneficiary or that the petitioner's IT technical hardware and software services business would require a management analyst to perform such duties as: advise management of alternative methods of solving organizational problems; recommend the implementation of new and modified systems of operations and organizational set-up; and ensure that standards and procedures criteria are met to enhance the petitioner's staffing procedures and major operations. In addition, although counsel asserts on the appeal that the petitioner since 1985 has "experienced extraordinary growth in the conduct of its national IT hardware and service business," counsel also states that the petitioner is recently experiencing an unfortunate economic slump, and that the petitioner thus needs the services of a professional management analyst "[i]n order to climb back in revenue and business volume." The record contains no corroborating evidence of any past extraordinary growth, such as federal income tax returns. Even with evidence of such past growth, the petitioner fails to demonstrate that it will employ the beneficiary as a management analyst. The generic description of the proposed duties fails to provide an understanding of what the beneficiary would attempt to accomplish in relation to the petitioner's IT technical hardware and software services business. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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). 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)). In view of the foregoing, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for management analysts and related positions. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. Many of the advertisers, which include; Google; a national privately-owned information and entertainment company of print publications, broadcast television stations and interactive businesses; and other businesses, are not similar to the petitioner's IT technical hardware and software services business. Neither do these listings indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Moreover, the petitioner has not demonstrated that the proposed duties of the proffered position are as complex as the duties described in the job postings, which include optimizing resource allocations across global support offices and providing accurate analytical and decision-making support to corporate departments, including legal, finance, human resources, purchasing, shareholder relations and

communications. Thus, the advertisements are insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The record contains insufficient evidence regarding parallel positions in the petitioner's industry or from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to establish that the proffered position involves duties with the requisite level of complexity or uniqueness; rather the petitioner has provided a general description of the occupation without identifying any complex or unique tasks pertinent to the petitioner's business that would elevate the position to one that requires the knowledge associated with a bachelor's degree in a specific discipline. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO notes counsel's reference to a prior AAO decision to state that factors such as the petitioner's size must not be considered. However, the basis of this decision does not rely on the nature or size of the petitioner to conclude that the proffered position does not meet any of the requirements for a specialty occupation; rather the AAO finds that the petitioner has not clearly documented the duties of the position in relation to its business. The complexity of the duties in relation to the petitioner's business must be analyzed. As discussed above, the generic description of the duties described in the record does not establish their complexity. The petitioner must do more than recite a general list of duties for an occupation from the *Handbook*. It must provide sufficient detail about the daily tasks to be performed by the beneficiary to allow the AAO to analyze whether those duties describe those of a specialty occupation. Again, counsel's assertion on appeal that the proffered position is that of a management analyst is noted. As noted above, however, 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. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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 AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the proffered position is newly opened. Counsel also states that the petitioner has a practice of hiring persons with a baccalaureate or higher degree, as the petitioner's CEO has a master's degree in business administration. It is noted that the CEO of the organization would presumably have increased responsibilities in running the organization. The petitioner has not established that the position of CEO is similar to that of the proffered position. Further, USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or 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. In this regard, the petitioner fails to establish that the management analyst position it is offering to the beneficiary entails the theoretical and practical application of a body of

highly specialized knowledge. Accordingly, the AAO finds that the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). The evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) – the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel states that because of the very complex and demanding nature of the proffered position, the petitioner requires at least a bachelor's or higher degree. The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, the record of proceeding lacks evidence of specific duties that would establish such specialization and complexity. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the position, not the occupation, or the industry-wide standard associated with the occupation. The petitioner has not provided sufficient documentary evidence that the duties of the proffered position contain elements that would require the beneficiary to have a unique set of skills attained through study at a bachelor's degree level in a specific discipline. Without a meaningful list of duties related to its specific business operations, the petitioner has not established that the generally described duties are either specialized or complex. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is coming to the United States to perform services in a specialty occupation as required by the statute at section 101(a)(15)(H)(i)(b) of the Act; 8 U.S.C. § 1101(a)(15)(H)(i)(b).

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.