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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: WAC 03 051 53693 Office: CALIFORNIA SERVICE CENTER Date: JAN 14 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

**DISCUSSION:** The service center director 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 computer and sales services company that seeks to employ the beneficiary as a management analyst. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

(*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*3*) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

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

The petitioner is seeking the beneficiary's services as a management analyst. The petitioner indicated in an undated letter that it wished to hire the beneficiary because she possessed a bachelor's degree. The petitioner also stated that the duties of the position are fully professional in that they require the application of a general body of knowledge normally obtained in an academically recognized course of study for a bachelor's degree in business administration, management or the equivalent in a related field. In addition, the petitioner stated

that the beneficiary was only offered this position following a "careful review of her qualifications, review of work product, extensive personal interviews and checking of references."

The director found that the beneficiary was not qualified for the proffered position because the beneficiary did not possess a master's degree in business administration or a related discipline. Evidence submitted by the petitioner established that the beneficiary had the equivalent of a baccalaureate degree in business administration from an accredited U.S. educational institution. In his decision, the director cited to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) 2002-2003 edition and its description of the educational requirements for management analysts sought by most employers in private industry. This description stated that most employers seek individuals with a master's degree in business administration or a related discipline and that some employers also required at least 5 years of experience in the field in which they planned to consult in addition to a master's degree. On appeal, counsel states that the issue of the beneficiary's lack of a master's degree was not identified by the director as an issue in the director's request for further evidence. Counsel cites to *Matter of Obaigbena*, 19 I&N Dec. 534 (BIA 1988), with regard to providing a reasonable opportunity for a petitioner to rebut derogatory evidence cited in a notice of intent to deny a visa petition. Counsel also cites to *Mayo v. Schiltgen*, 921 F.2d 177 (C.A. 8 (Minn.), 1990), and states that the decision specifies that if an agency's rationale for a decision is inadequate or improper, the court must reverse and remand the decision for the agency to consider whether to pursue a new rationale for its decision or perhaps change its decision.

With regard to counsel's assertion that the director's decision should be remanded for further consideration, 8 C.F.R. § 103.2 (b)(8) states that if there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence. In examining the issues raised by counsel, it is acknowledged that the request for further evidence sent to the petitioner addressed peripheral issues, while not examining the actual adjudicatory issues of whether the proffered position is a specialty occupation, and whether the beneficiary is qualified to perform the duties of the proffered position. Nevertheless, the AAO considers the initial petition to contain sufficient evidence of ineligibility to review the merits of the petition without a remand of the petition to the director.

The original petition as submitted contained insufficient evidence in two areas: namely, whether the proffered position was a specialty occupation, and whether the beneficiary was qualified to perform the duties of the proffered position. These issues are intrinsically connected with regard to the determination of eligibility of H-1b visa status.

Section 214(i)(l) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(l), 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)(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.

With regard to whether the proffered position is a specialty occupation, the petitioner identified itself as a company in operation that has 20 employees. Among the job duties outlined in the petitioner's cover letter were duties such as research and productivity analyses aimed at increasing operational efficiency and cost effectiveness; the formulation of appropriate management methods and employee relations strategies; the establishment of methods to increase profitability, manage expenses and reduce overhead; and the conduct of studies of procedures such as organizational changes, communications, information on problems and procedures. The job holder would also determine which components of the business are functioning below par and which margins can be flexed, and would create a managerial framework that would enable the company to achieve its organizational mission.

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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. As correctly stated by the director, the *Handbook* indicates that management analyst positions in private industry usually require a master's degree in business administration or a related field, along with extensive experience. In examining the job duties outlined by the petitioner, it should be noted that the petitioner has provided very generic job duties. The job duties provide no specific information with regard to the petitioner's actual business operations, the existing deficiencies, other than decreasing market share, or future management needs. This lack of specificity makes it difficult to determine whether the proffered position is that of a management analyst, at either a baccalaureate or master's degree level of expertise. 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 bachelor's

degree in the specific specialty as the minimum for entry into the occupation as required by the Act. [1] To the extent that the job description does not illuminate the actual position, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Regarding parallel positions in the petitioner's industry, the petitioner submitted no relevant information to the record. The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

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. Although the petitioner has been in business since 1988, it appears that the proffered position is new to the company. If the petitioner has employed other management analysts previously, no information has been submitted to the record. The record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO turns to the criterion 8 C.F.R. § 214.2(h)(iii)(A)(*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. The duties as described in the record, are extensive. However, they are not detailed or specific to the petitioner's business operations. For example, the petitioner appears to have been in business since 1988, but there is no specific information in the record on the current management framework that presently needs revision. There is no information in the record on the actual volume or type of computer sales or services presently provided by the petitioner and any complexity or specialization in these operations. Without more persuasive evidence, the petitioner has not established this criterion. 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*).

With regard to the beneficiary's qualifications, while she possesses a baccalaureate degree in business administration, the *Handbook*'s classification of management analyst indicates that such a degree may not be sufficient to perform the duties of the proffered position. While it is possible that some employers in private industry may hire an individual with a baccalaureate degree for an entry level management analyst position, the norm, in private industry, as discussed in the *Handbook,* is to hire consultants to address specific management problems on a project basis. With regard to any additional training, or employment experience that might provide the beneficiary with the equivalent of a master's degree in business administration, the petitioner in its cover letter, stated that it reviewed the beneficiary's qualifications, review of work product, extensive personal interviews and checking of references. The record is devoid of any information with regard to any previous employment of the beneficiary since her graduation from college in 2000. There are no employer references in the record, nor any documentation of work products. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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[1] The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2 (h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

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 qualified to perform the duties of the proffered position. Accordingly, the AAO shall 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.