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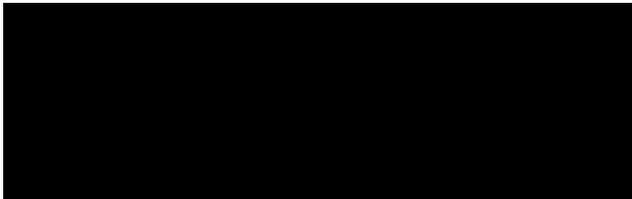
FILE: WAC 03 231 50649 Office: CALIFORNIA SERVICE CENTER Date: **AUG 10 2005**

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.

Robert P. Wiemann

Robert P. Wiemann, Director
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 a residential care facility that seeks to employ the beneficiary as a strategic 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

Section 214(i)(1) of 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)(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 proffered position.

The record of proceeding before the AAO contains: (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 strategic management analyst. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail conducting work simplification and measurement studies that implement company strategies; coordinating and arranging promotional activities such as online advertising; developing and implementing a record management program for filing, protection, and retrieval of records, and assuring compliance with the program; interviewing personnel and conducting on-site observations to ascertain the functions of employees, work performed, methods, equipment, and personnel used; preparing a manual and having training about forms, procedures, and strategic policies; developing strategies for business expansion and finding the proper location; assisting management in controlling supplies, employee efficiency, and profitability; documenting the findings of studies and preparing recommendations for new procedures and organizational changes; recommending supply purchases and the layout of equipment; designing, evaluating, recommending, and approving changes to manuals, forms, and reports, including marketing tools; gathering and organizing information on problems and procedures. The petitioner's November 26, 2003 letter elaborated on the duties. For the proposed position the petitioner requires a bachelor's degree in business administration or a related field and at least three years of managerial experience.

The director stated that some of the proposed duties resemble those of general and operations managers as those occupations are described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*); and that the *Handbook* discloses that these occupations do not require a bachelor's degree in a specific specialty. According to the director, the *Handbook* reports that for management analyst positions most employers in private industry generally seek individuals with a master's degree in business administration or a related discipline, and that some also require at least five years of experience. A baccalaureate degree is not required, the director stated, for entry into a marketing researcher, public relations, or general managerial position. The director found that the evidence regarding the beneficiary's prior employment failed to establish that the beneficiary has recognition of expertise in the specialty through progressively responsible experience that is directly related to the specialty. The beneficiary's supervision of six direct staff, the director stated, involves general managerial duties rather than management analysis. According to the director, a manager or executive is generally considered a member of a specialty occupation if the position involves supervising employees who are working in specialty occupations; a manager or executive is not normally considered a member of a specialty occupation if he or she supervises employees that are not members of a specialty occupation. The director found the proposed duties and stated level of responsibility did not indicate complexity or authority that is beyond what is normally encountered in the occupational field. The submitted evidence, according to the director, did not demonstrate that the petitioner normally requires a baccalaureate or higher degree in a specific specialty.

On appeal, counsel states that the proposed position is complex in nature, requiring a bachelor's degree and managerial experience as well as knowledge and skills about financial analysis, financial and economic projections, research, management and accounting, calculations showing financial ratios, profit margins, and

rates of return; and income statements, balance sheets, and rates of charge, and measuring performance. Counsel asserts that the sixth edition of the book entitled *Strategic Management Concepts and Cases* defines strategic management. Counsel maintains that the proposed position is similar to a management analyst and is distinguishable from a general manager. Counsel states that the *Handbook* reports that not all employers and industries require a master's degree in business administration and five years of experience for a management analyst position. According to counsel, the evidence shows that the petitioner normally requires a baccalaureate degree for the proposed position; that the prior employee held a strategic management analyst position; and only 15 percent of the beneficiary's time involves supervision.

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.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. Counsel's assertion is not persuasive. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO next considers 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The AAO agrees with the director's statement that the proposed position resembles an operations manager, and recapitulates here the *Handbook's* text about the duties of an operations manager:

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

Counsel asserts that the proposed position is distinguishable from a general manager by claiming that the proposed position requires knowledge of financial analysis; financial and economic projections; research; management and accounting; calculations showing financial ratios, profit margins, and rates of return; income statements; balance sheets; rates of charge; and measuring performance. In the November 26, 2003 letter the petitioner conveys that the beneficiary will conduct work simplification and measurement studies to implement company strategies, and that this includes “budgetary and financial analysis, developing and monitoring performance measures, evaluating program efficiency and effectiveness” and “preparing budgets, revenue and expenditure forecasts; working on budget and operations activities.” Only 15 percent of the beneficiary's time will be spent on these duties, which the AAO finds to be encompassed within the broad duties of an operations manager.

Counsel also claims that the proposed position, unlike an operations manager, involves promotions, records management, personnel, training manuals, expansion strategies, supplies, and designing equipment layouts. These responsibilities are encompassed within the *Handbook's* description of an operations manager that is charged with planning, directing, or coordinating the operations of a company, which includes formulating policies, managing daily operations, and planning the use of materials and human resources.

The proposed position involves supervision of six direct care staff that assist residents with personal hygiene, accompany residents to medical and dental appointments, and supervise the residents' intake of medication. The direct care staff are similar to home health aides, which the *Handbook* reports is an occupation that does not require a bachelor's degree. Thus, the beneficiary will not supervise employees occupying specialty occupations.

Counsel makes assertions about and refers to the book "*Strategic Management Concepts and Cases*," but the record contains no independent documentary evidence from this book. 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 Obaighena*, 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).

With respect to the educational requirements of an operations manager, the *Handbook* relays that “[t]he formal education and experience of top executives varies as widely as the nature of their responsibilities, and that “[m]any top executives have a bachelor's or higher degree in business administration or liberal arts.”

Accordingly, employers do not require a baccalaureate degree in a specific specialty for an operations manager.

The AAO's conclusion, from the various evidences to which it has referred, is that the petitioner fails to satisfy the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which is that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits no evidence to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations. Counsel asserts that the petitioner "has its standards similar to other organizations to hire somebody who has a baccalaureate degree." But no evidence in the record supports this assertion. 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*; *Matter of Laureano*; *Matter of Ramirez-Sanchez*.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – that the proffered position is so complex or unique that it can be performed only by an individual with a degree. As discussed earlier in this decision, the proposed position is analogous to an operations manager, which is an occupation that the *Handbook* reveals does not require a baccalaureate degree in a specific specialty.

The petitioner refers to an approved H-1B petition issued to a former employee to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the proposed position. This is not persuasive evidence. 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 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.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As discussed already, the proposed position resembles an operations manager, which the *Handbook* reports is an occupation that does not require a baccalaureate degree in a specific specialty.

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 id.* at 387.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that 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. In this decision the AAO has already conveyed that the *Handbook* reveals that the proposed position is parallel to an operations manager, which is an occupation that does not require a baccalaureate degree in a specific specialty. No evidence demonstrates that the beneficiary will perform specialized and complex duties that require a bachelor's degree in a specific specialty. The petitioner, therefore, fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

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.