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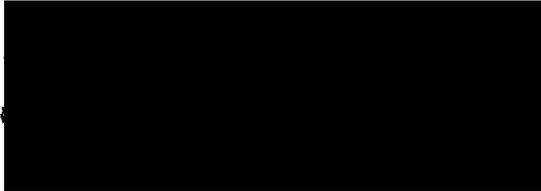
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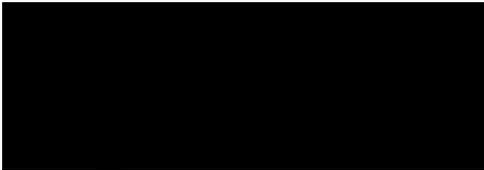
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FILE: WAC 03 185 50186 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(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 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 private international cargo forwarder. In order 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)(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 the basis that the petitioner failed to establish that the proffered position meets any specialty occupation criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director noted that the general duties described for the position appear to be those of a management analyst, but that the evidence of record did not indicate that the beneficiary would be so employed. Also, the director commented that the beneficiary was not qualified to serve in a management analyst position because she did not possess a master's degree, which, on the basis of information in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, the director found to be the minimal educational requirement for employment as a management analyst. The director also indicated that the petitioner's partial response to the request for additional evidence (RFE) frustrated the ability of Citizenship and Immigration Services (CIS) to evaluate the nature of the specific business enterprise that the beneficiary would be employed to analyze:

In response to the Service's request for additional evidence, counsel reiterated that the degree requirement of the position is made imperative by the very complex and specialized nature of the duties to be performed by the beneficiary. Although the duties appears [sic] to be a management analyst, counsel did not submit evidence to prove the petitioner's need for the proffered position. The Federal Income Taxes for 2001 and 2002 as well as the Quarterly Wage Report for the last four quarters were not submitted. Counsel's statement in response: "Petitioner is still in the process of preparing its income tax return for the taxable year 2002 due to heavy volume of business investment programs and accounts that petitioner needs to settle. As to its Form D-6, petitioner manifests that its employees are mostly hired on [a] contractual basis, whose number varies from time to time." There is no mention regarding the 2001 tax returns and the DE-6 why it was not submitted.

According to the director, "As presently constituted the record prohibits USCIS from making an affirmative determination as to the nature, complexity, and viability of the petitioner's business."

The director stated that the petitioner had failed to establish any specialty occupation criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel asserts that hiring a management analyst is "imperative business judgment" based on the petitioner's need to "achieve both cost efficiency, business convenience, and to streamline the management systems" (brief, at page 5.) Counsel also asserts that the petitioner had satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), stating, in part:

The nature of the specific duties relating to the position of a Management Analyst is so specialized and complex that their satisfactory and efficient performance is usually associated with attainment of a baccalaureate or higher degree in the occupational field. The Service did not squarely rule on this single, most important issue to the prejudice of Petitioner-Appellant's legitimate sentiment of hiring the professional services of a Management Analyst.

[Brief, at page 9]

With regard to the tax information issue, counsel states:

The Petitioner-Appellant respectfully manifests that it only started doing business last April 26, 2001, hence for this logical reason, the Petitioner can not submit its 2001 tax returns and the DE-6 of its employees during the last four quarters. Furthermore, it was also manifested at the time of the filing of Petitioner's response to the [RFE], Petitioner was still in the process of preparing its income tax return for the taxable year 2002 due to the heavy volume of business and financial transactions and numerous accounts that the Petitioner-Appellant needs to settle.

With regard to the DE-6 Quarterly Wage Report of the Petitioner's employees, it was also previously manifested in the Petitioner's response to the [RFE] that its employees are hired on a contractual basis. Since Petitioner's employees vary from time to time, and are therefore considered as independent contractors using the Form 1099 on their own, therefore the requirement for the submission of Form DE-6 on the part of the Petitioner should not apply.

For the reasons discussed below, the AAO has determined that the director was correct to dismiss the petition for failure to establish that the proffered position is a specialty occupation. Accordingly, the appeal will be dismissed and the petition will be denied.

The AAO bases its decision upon its review of the entire record, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the RFE; (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief on appeal.

Section 214(i)(1) of 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.

Thus it is clear that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty.

In line with this section of the Act, 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] 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 [2] 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.

In accordance with the statutory and regulatory provisions to which 8 C.F.R. § 214.2(h)(4)(iii)(A) is related, Citizenship and Immigration Services (CIS) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the evidence demonstrates that the petitioner has proffered a position that requires neither the theoretical and practical application of a body of highly specialized knowledge nor the type of specialized degree which signifies the attainment of such knowledge.

For the reasons discussed below, the AAO finds that the record of proceeding does not substantiate counsel’s contentions. The director was correct to deny the petition.

According to the May 21, 2003 letter of support that the petitioner submitted with the Form I-129, the beneficiary would “conduct continuing special studies of departmental organization, methods, and procedures to recommend solutions to clearly defined operating problems in areas involving work and information flow; systems analysis/design; cost/benefit analysis; review of personnel policies; policy and procedures development/analyses;

and analyses of organizational structure.” Also according to this letter, relative to these duties the beneficiary “would be responsible for the following specific job duties”:

- (1) Analyzing operating divisions to make recommendations on improving, revising and modifying organizational structure, work methods, systems and procedure by a) researching existing methods of accomplishing tasks; b) using appropriate data collection techniques; and c) designing survey methods;
- (2) Conducting management reviews of unit operations, information flow, integrated production methods, and inventory control to identify work problems, program deficiencies, and resource waste;
- (3) Writing reports on results of investigation and analyses to provide required information to management by summarizing findings, identifying problem areas and recommending methods to improve operations;
- (4) Planning, developing, and recommending 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;
- (5) Assisting management in developing the firm’s standard operating procedures, organizational procedures, organization/function/position charts preparatory to staffing and performance standards;
- (6) Preparing work simplification and classification studies, and, establishing operations and procedures manuals to assist management in operating more efficiently and effectively; and
- (7) Performing other related management systems analyses, as required.

The 2004-2005 edition of the *Handbook* indicates clearly that performance of the duties of management analyst positions normally require at least a bachelor’s degree in a closely related specialty:

Firms providing management analysis range in size from a single practitioner to large international organizations employing thousands of consultants. Some analysts and consultants specialize in a specific industry, such as healthcare or telecommunications, while others specialize by type of business function, such as human resources, marketing, logistics, or information systems. In government, management analysts tend to specialize by type of agency. The work of management analysts and consultants varies with each client or employer, and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the

organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers.

....

Educational requirements for entry-level jobs in this field vary widely between private industry and government. Most employers in private industry generally seek individuals with a master's degree in business administration or a related discipline. Some employers also require additional years of experience in the field in which the worker plans to consult, in addition to a master's degree. Some will hire workers with a bachelor's degree as a research analyst or associate. Research analysts usually need to pursue a master's degree in order to advance to a consulting position. Most government agencies hire people with a bachelor's degree and no pertinent work experience for entry-level management analyst positions.

Few universities or colleges offer formal programs of study in management consulting; however, many fields of study provide a suitable educational background for this occupation because of the wide range of areas addressed by management analysts. These include most academic programs in business and management, such as accounting and marketing, as well as economics, computer and information sciences, and engineering. In addition to the appropriate formal education, most entrants to this occupation have years of experience in management, human resources, information technology, or other specialties. Analysts also routinely attend conferences to keep abreast of current developments in their field.

Read in the context of the entire *Handbook* section in which they appear, these paragraphs indicate that specific management analyst positions in the private sphere require most often a master's degree in a specialty closely aligned with the particular business aspects which the management analyst would analyze, such as engineering, marketing, or computer science.

In order to determine whether a petitioner has established that the position it has proffered actually requires the knowledge and educational credentials prescribed by the statutory and regulatory framework on specialty occupations, CIS must look beyond the title and educational credentials that a petitioner specifies. CIS must examine the ultimate employment of the alien to determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000). In this pursuit, 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be

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<sup>1</sup> 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.

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.

The AAO concurs with the director that the petitioner has failed to establish that it will employ the beneficiary in a specialty occupation.

The petitioner has limited its description of the proffered position to generalized and generic terms that convey neither specific, concrete tasks involved nor the type and level of specialized knowledge that those tasks would require. While the petitioner asserts that the job performance would require the possession and application of the specialized knowledge attained by a baccalaureate degree in a specific specialty, the validity of this assertion is not evident in the record. Counsel and the petitioner fail to provide concrete, petitioner-specific business matters and related specific tasks of the beneficiary that would establish that the beneficiary would actually be employed in management analysis work that requires at least a bachelor's degree in a specific specialty. For instance, neither counsel nor the petitioner delineate any of the "clearly defined operating problems in areas involving work and information flow; systems analysis/design; [and] cost/benefit analysis" that are described as the duties. There are no descriptions of the "operating divisions" for whom the beneficiary would be hired to offer recommendations "on improving, revising and modifying organizational structure, work methods, systems and procedure." No specific information is provided about "the unit operations, information flow, integrated production methods, and inventory" to indicate that they would involve the application of the highly specialized theoretical and practical knowledge that characterizes management analyst work. Thus, it cannot be determined that the beneficiary will be performing duties as a management analyst, and that the position requires a minimum of a master's degree in a closely related specialty to discharge the duties. The beneficiary cannot establish eligibility under the first criterion.

The evidence of record does not satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) which assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner. In determining whether there is such a common degree requirement, factors often considered by CIS 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 record does not contain these or any other types of evidence that would qualify the position as a specialty occupation under this prong.

The generalized and generic nature of the evidence also does not establish the proffered position as a specialty occupation under the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2) by demonstrating that this "particular position is so complex or unique that it can be performed only by an individual with a degree."

The petitioner has not presented evidence that satisfies the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

The evidence of record also does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As noted, the petitioner describes the position and its duties in exclusively generalized and abstract terms that relate no meaningful information about the specific tasks that would comprise the beneficiary's work. Accordingly, the record fails to establish that the specific duties involve the requisite specialization and complexity. Counsel's argument that the petitioner has satisfied this criterion is without merit.

The AAO also finds counsel's explanation about the failure to provide the requested tax information unpersuasive. Counsel has not provided any of the documentation on appeal found lacking by the director. The appeal was filed in February 2004, and tax return information for tax year 2002 therefore should have been available for submission on appeal to overcome the director's issue with this lack of information relative to the petitioner's business and the credibility of its petition. On appeal and in the RFE response counsel provided no documentation of the "heavy volume of business and financial transactions and numerous accounts that the Petitioner-Appellant needs to settle." 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)). 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 failure to produce requested tax documents, and the unconvincing nature of counsel's explanation reflect unfavorably on the credibility of the petition. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Furthermore, as indicated by the director, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

The petitioner has failed to establish that the proffered position is a specialty occupation within the meaning of the Act and the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, there is no basis for disturbing the director's decision.

As the evidence of record fails to establish that the proffered position is a specialty occupation, the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential.

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.