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FILE: WAC 04 235 51782 Office: CALIFORNIA SERVICE CENTER Date: **AUG 29 2006**

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 director of the California 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 states it is a residential healthcare business, with 16 employees. It seeks to employ the beneficiary as a management analyst. The director denied the petition because he determined that the petitioner had failed to establish that it would employ the beneficiary as a management analyst.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director; and (4) Form I-1290B, with counsel's brief and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner has established that it has a specialty occupation for which it seeks the beneficiary's services. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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 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.

The petitioner states that it seeks the beneficiary’s services as a management analyst and that the position requires the minimum of a baccalaureate degree in business administration, commerce or a related field. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s letter of support accompanying the Form I-129; and its January 3, 2004 response to the director’s request for evidence. At the time of filing, the petitioner indicated that it was in the process of acquiring new facilities and expanding its services. It stated that “[i]n line with expansion plans, and as part of [its] objective to optimize operations,” it required the services of a management analyst.

The beneficiary’s responsibilities, as described by the petitioner, include:

- Defining and analyzing the company’s operations, needs and goals; and its annual revenues, employment and expenditures;
- Conducting interviews of staff to determine and assess work flow and productivity;
- Conducting organizational, administrative, fiscal and personnel studies;
- Conducting surveys and collecting information on operational and administrative problems;
- Coordinating and participating in special projects;
- Compiling and preparing reports, memoranda, policies, manuals and newsletters;
- Preparing tables, charts and graphs to illustrate the distribution and trends of statistical and financial data;
- Assisting in the preparation of the annual budget by obtaining, compiling and entering data, and monitoring expenditures;
- Inspecting policies and procedures to determine compliance with government regulations, and explaining government regulations, rules and procedures to managers;
- Tracking legislation affecting business;
- Coordinating all intra-departmental or departmental activities with outside agencies;
- Interviewing with all staff managers to determine departmental needs and areas that can be improved;
- Reviewing and developing personnel solutions;
- Preparing projections and recommendations using internal and external factors and information;

- Preparing proposals for new facility establishment, including budgeting, staffing, scheduling and projections; and
- Providing assistance in the implementation of new systems for control over operations, including inventories, receivables and labor costs.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 director based his denial of the instant petition, in part, on his determination that the petitioner did not have the type of business or the scope or organizational complexity to require the services of a full- or part-time management analyst. While, as discussed below, the AAO does not find the record to demonstrate that the petitioner would employ the beneficiary as a management analyst, it has reached its conclusions on grounds other than those relied upon by the director.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity, nor operate the type of business that would require the services of a management analyst. The 2006-2007 edition of the *Handbook* indicates that management analysts work at both large and small businesses that need assistance in controlling their operations and expenses, or that need to develop strategies to help them remain competitive in a changing marketplace. [*Handbook* at 92]. It reports that management analysts are found in a wide range of industries, including management, scientific and technical consulting firms, in computer systems design and related services firms, and federal, state and local government. Accordingly, the petitioner's intention to employ a management analyst may not be discounted based on its type of business. Neither does the fact that the petitioner has a limited number of managers "to observe and to implement the recommendations made by the analyst" establish that it would not employ the beneficiary to perform the duties of a management analyst. Therefore, the AAO withdraws the director's findings in this regard.

While neither the petitioner's type of business nor its organization preclude it from establishing the proffered position as that of a management analyst, it has, nevertheless, failed to provide the evidence necessary to demonstrate that the position falls within this occupational title. The petitioner's description of the proffered position offers a broad outline of the beneficiary's responsibilities, a number of which are typically performed by management or budget analysts in the course of their employment. However, the similarity between the petitioner's description of the duties of the proffered position and those performed by management analysts

does not establish the proffered position as a specialty occupation. The duties outlined by the petitioner, with one exception, describe the type of work performed by management analysts rather than the specific tasks that would be performed by the beneficiary in connection with the petitioner's residential healthcare business.

The single duty related to the petitioner's operations is that involving the preparation of proposals for the establishment of new healthcare facilities. However, although the petitioner at the time of filing claimed to be in the process of acquiring new facilities, it has submitted no evidence to support this claim, e.g., business plans, loan or mortgage applications, purchase agreements, related correspondence or licensing applications. Although the record does contain a copy of a license for one of the petitioner's facilities that has an effective date that postdates the filing of the Form I-129, the AAO does not find it to be sufficient proof of the petitioner's expansion plans. The license does not demonstrate that the facility is a newly acquired property. As the record does not establish that the petitioner is in the process of acquiring additional facilities, the beneficiary's responsibility for preparing proposals to establish these new facilities will not be considered as one of the duties of the proffered position.

The AAO, as previously discussed, requires information regarding the actual responsibilities of a proffered position to make its determination regarding the nature of that position and its degree requirements, if any. *See Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). Without such information, the AAO is unable to determine the tasks to be performed by a beneficiary on a day-to-day basis and, therefore, whether a proffered position's duties are of sufficient complexity to require the minimum of a baccalaureate degree or its equivalent. As the record in the instant case fails to offer a meaningful description of the proffered position's responsibilities in relation to its residential health care business, the petitioner is unable to establish that the position is that of a management analyst. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

Moreover, as the petitioner has submitted no evidence related to its acquisition of new sites, it has failed to prove that it is expanding its services or that it would employ a management analyst to support this expansion. Therefore, the petitioner has not demonstrated that the beneficiary would be coming to the United States to perform the duties of a special occupation pursuant to 8 C.F.R. § 214.2(h)(1)(B)(1).

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), a petitioner must prove that a specific degree requirement is common to its industry in parallel positions among similar organizations or, alternately, that a proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant case, the petitioner has submitted no evidence that demonstrates that the offered employment qualifies as a specialty occupation under either prong of the criterion. Moreover, the petitioner's failure to provide a specific and detailed description of the proffered position's duties precludes it from establishing the proffered position as parallel to any degreed positions within similar organizations in its industry or distinguishing it from similar but non-degreed employment based on its complexity or unique nature.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine whether a proffered position may be established as a specialty occupation under the third criterion – the employer normally requires a degree or its equivalent for the position – the AAO usually reviews the petitioner’s past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. In the instant case, the petitioner does not contend that the position may be established as a specialty occupation on the basis of its normal hiring practices. Further, the record indicates that the proffered position is newly created in response to the petitioner’s expansion plans and that the petitioner has no hiring history regarding it. Thus, the petitioner has not established eligibility under this criterion.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of the proffered position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. However, without a meaningful description of the proffered position’s duties, the petitioner cannot establish them as either specialized or complex. Accordingly, the record also fails to prove that the proffered position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the AAO does not find the record to establish that the beneficiary is qualified to perform the duties of a specialty occupation.

To establish the beneficiary’s qualifications as a management analyst, the petitioner has submitted copies of the beneficiary’s degree in office administration from the Eulogio “Amang” Rodriguez Institute of Science and Technology in The Philippines, her academic transcripts from that institution and an evaluation of her academic credentials prepared by the Global Education Group, Inc. in Miami, Florida. The evaluation finds the beneficiary to have the equivalent of a U.S. bachelor’s degree awarded by a regionally accredited college in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(2), a beneficiary may be found qualified to perform the duties of a specialty occupation if he or she holds a foreign degree determined to be equivalent to a U.S. baccalaureate or higher degree required by the specialty. While the credentials evaluation submitted by the petitioner finds the beneficiary to hold a foreign degree that is the equivalent of a U.S. baccalaureate degree, it does not indicate the academic field of that degree equivalency. Therefore, the record does not demonstrate that the beneficiary’s U.S. degree equivalency is in a field required by the specialty, as required to satisfy the referenced criterion. For this reason as well, the petition will be denied.

The AAO notes that the basis for its decision differs from that relied upon by the director. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d* 345 F.3d 683 (9th Cir. 2003); *see*

also Dor v. INS, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

For reasons related in the preceding discussion, 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 a specialty occupation. 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.