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U.S. Citizenship
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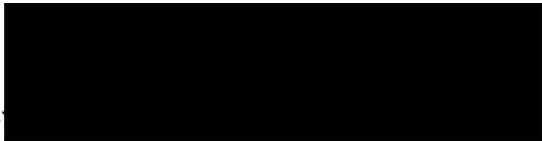
FILE: SRC 04 240 51699 Office: TEXAS SERVICE CENTER Date: JUN 09 2006

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Texas 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 restaurant and catering business, was established in 1996, has 6 employees and gross annual income of approximately \$258,142. It seeks to employ the beneficiary as a management analyst. The director denied the petition based on his determination that the proffered position was not a specialty occupation.

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

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 Immigration and Nationality Act (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.

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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as a management analyst. Evidence of the beneficiary’s duties includes: the Form I-129 and supporting documents; and counsel’s November 18, 2004 response to the director’s request for evidence.

Counsel asserts that the duties of the proffered position are the same as the position of management analyst as described in the *Dictionary of Occupational Titles (DOT)* and in the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, and as such establishes the position as a specialty occupation.

The director determined that the petitioner did not establish any of the criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO agrees with the director.

At the time of filing, and in response to the RFE, the petitioner stated that the duties of the proffered position would require the beneficiary to:

- Analyze operating procedures to devise most efficient methods of accomplishing work;
- Plan study of work problems and procedures;
- Analyze data gathered, develop information, and consider available solutions or alternate methods of proceeding;

To determine whether the duties just described are those of a specialty occupation, the AAO first 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; 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 *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

As the petitioner has characterized its position as that of a management analyst, the AAO first turns to the *Handbook's* description of management analyst. The 2006-2007 *Handbook*, at <http://www.bls.gov/oco/ocos019.htm>, describes the occupation of management analyst as follows:

As business becomes more complex, the Nation's firms are continually faced with new challenges Management analysts, often referred to as management consultants in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. For example, a small but rapidly growing company that needs help improving the system of control over inventories and expenses may decide to employ a consultant

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 . . . while others specialize by type of business function The work of management analysts and consultants varies with each client or employer, and from project to project In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data, which may include annual revenues, employment, or expenditures, and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture

Once they have decided on a course of action, consultants report their findings and recommendations to the client. These suggestions usually are submitted in writing For some projects, management analysts are retained to help implement the suggestions they have made.

The AAO finds the petitioner's description of the duties of its proffered position to reflect the type of activities generally performed by management analysts as described in the *Handbook*. However, the petitioner's listing of these duties is so generic, and so nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. For example, although the petitioner has stated that the beneficiary would analyze data gathered, develop information, and devise available solutions and alternate methods of proceeding, it offers no indication of what the petitioner would require of the beneficiary in completing such an examination and analysis. Without this type of description, the AAO is unable to determine whether the responsibilities of the proffered position would require the beneficiary to hold the minimum of a baccalaureate or higher degree or its equivalent to perform them.

The AAO notes that counsel referenced the Specific Vocational Preparation (SVP) rating given to the occupation of management analyst by the *Dictionary of Occupational Titles (DOT)*. However, the AAO does not consider the *DOT* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

Counsel's response to the director's request for evidence stated that the petitioner had met its burden of proof regarding the first criterion. He contended that the proffered position's degree requirement was established because both the *Handbook* and the *DOT* indicate that a bachelor's degree is a prerequisite for entry into a management position. While the position of management analyst is generally a specialty occupation, requiring a master's degree in business or a related field, the petitioner has not established that it would employ the beneficiary as a management analyst. The petitioner must do more than recite the duties of a position as those duties are listed in the *Handbook*; it must relate those duties to the specific business operations of the petitioner so that CIS might analyze whether the performance of the duties would require a degree in a specialty. This, the petitioner has not done. The evidence of record indicates that the petitioner's staff includes a cook, assistant cook, dishwasher and front counter workers, and has a gross annual income of \$258,142. The petitioner has not indicated in any specific detail how the management analyst would analyze data gathered, develop information, and devise available solutions and alternate methods of proceeding. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel contends that because of the petitioner's future expansion plans, the duties of the proffered position satisfy the criterion's requirements. The AAO does not agree.

As previously noted, the AAO requires information regarding the specific duties of a proffered position, as well as the nature of the petitioning entity's business operations, to make its determination regarding the position's degree requirements, if any. The petitioner has not submitted business development plans or other

documentation to establish its expansion plans or to support its position that the complexity of the duties requires a 4-year degree in business or a related field. The record does not establish the complexity of the petitioner's restaurant business the beneficiary will analyze. 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 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 reaching its decision, the AAO has also reviewed the evaluation, which the petitioner has submitted to establish its degree requirement. The opinion, dated September 24, 2004, is authored by [REDACTED] a consultant and an adjunct professor at the University of Houston, Texas. [REDACTED] states that the petitioner would benefit more from employing a management analyst in-house than hiring an outside consultant. There is no indication that the expert reviewed the operations of the business before recommending the hiring of an in-house analyst. Further, [REDACTED] does not conclude that the duties of the position are those of a management analyst requiring at minimum a bachelor's degree in a specialty. [REDACTED] does not indicate that he reviewed the duties of the position, and thus there is an inadequate factual foundation to support the opinion. Thus, the opinion is of little merit in establishing that the position is a specialty occupation. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Accordingly, the AAO finds that the record does not establish that the proffered position qualifies as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. On appeal, counsel contends that the record of evidence establishes the petitioner's degree requirement as the norm within its industry. He asserts that the DOL *Handbook's* discussion of the occupation of management analyst satisfies the requirements of the first prong as it establishes that the minimum requirement for entry into the profession is a bachelor's degree. The AAO does not agree.

The petitioner has failed to establish that the proffered position is that of a management analyst, as described by the *Handbook*. No other evidence in the record proves that the petitioner's degree requirement for the proffered position is common to its industry in parallel positions among similar organizations.

Further, the record does not establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. The AAO finds no evidence in the record that would support such a finding. Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(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 a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, in the instant case, counsel has indicated that the proffered position is newly created. Accordingly, the petitioner is unable to provide evidence of its normal hiring practices with regard to the proffered position and has not established it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the 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. As previously discussed, in his response to the director's request for evidence, counsel included a consultant's support letter, stating that an in-house management analyst would be preferable to the petitioner hiring an outside management consultant. However, the support letter does not state that the position of management analyst at the petitioner's business involves highly complex tasks, and duties typically acquired by obtaining at least a bachelor's degree in business, management, or a related field. Therefore, the consultant's recommendation does not satisfy the requirements of the fourth criterion. Simply going on record without supporting documentary evidence is not sufficient for the 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).

Further, the generic description of the duties of the proffered position, which precluded consideration of the proffered position under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) also makes it impossible to evaluate these duties under the specialized and complex threshold of the fourth criterion. Accordingly, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

On appeal, counsel also cites a series of CIS decisions – instances in which jobs involving management analysts have been found to qualify as specialty occupations – as evidence that the work of management analysts qualifies as a specialty occupation. However, as the proffered position has not been established to be that of a management analyst, such decisions are not probative for the purposes of this proceeding. Further, CIS' previous approval of petitions for management analysts cannot serve as a basis for approving the instant petition. Each petition filing is a separate proceeding with a separate record, and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.