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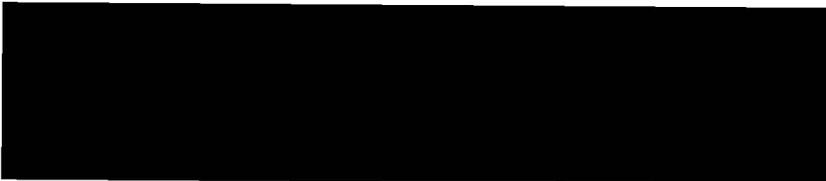
FILE: LIN 03 217 51674 Office: NEBRASKA SERVICE CENTER Date: JUN 28 2006

IN RE: Petitioner:
Beneficiary:



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.

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. Based upon the petitioner's showing that a brief that had been timely submitted on appeal was not included in the record of proceeding considered by the AAO in rendering its previous decision, the AAO here grants the petitioner's motion to reopen the proceeding and reconsider the evidence, including the aforementioned brief. The previous decision of the AAO is withdrawn. Upon reopening and reconsideration, the AAO affirms its earlier decision. The petition will be denied.

The petitioner is engaged in the retail merchandising of convenience foods, dry goods, and imported gifts. 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). In part, the director found that the duties of the proffered position "appear to be closely related to the duties performed by a management analyst as described in [the Department of Labor's *Occupational Outlook Handbook (Handbook)*]." However, the director also determined that, by the range of degree fields which it reports that employers find acceptable, the *Handbook* indicates that the management analyst occupation is not one that requires a degree in a specific specialty.

On appeal, counsel contends that the director's decision does not accord with the evidence of record and court cases. Counsel also asserts that the director's decision conflicts with AAO decisions that determined that management analyst positions were specialty occupations. 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 this decision upon its review of the entire record as now constituted, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B, filed on October 23, 2003, and the matters appended to it; (6) the petitioner's brief on appeal, consisting of a Form I-290B, date-stamped January 10, 2005, with counsel's statements beginning at part 3 of the form and extending through a five-page addendum; (5) counsel's December 28, 2005 cover letter requesting consideration of the brief; and (6) the documents submitted by counsel with the brief and cover letter, which are related to the brief's earlier absence from the record despite counsel's timely submission.

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.

For the reasons discussed below, the AAO finds that the record of proceeding does not substantiate counsel’s contentions. The AAO finds that the director was correct to deny the petition, but disagrees with the reasoning upon which the director based his decision.

The AAO disagrees with the director's conclusion that, as described in the *Handbook*, management analyst positions do not qualify under section 1 of 8 C.F.R. § 214.2(h)(4)(iii)(A).¹ These paragraphs from the 2006-2007 edition of the *Handbook* indicate more clearly than the paragraphs from an earlier edition quoted by the director that performance of the duties of management analyst positions normally require at least a bachelor's degree in a specific specialty that is closely related to the duties:

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

¹ In reaching this determination, the AAO accorded no weight to the information submitted from the *Dictionary of Occupational Titles (DOT)*, as this resource does not analyze positions in terms of their status as a specialty occupation under the Act and related CIS regulations. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. It provides an assessment (the SVP rating) that is meant to indicate only the total number of years of vocational preparation required for a particular position. 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.

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 section in which they appear, these paragraphs indicate that specific management analyst positions in the private sphere require 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, or a master's of business administration. This differs from an occupation for which the acceptability of a wide range of distinctly different academic majors would signify that highly specialized knowledge would not have to be applied on the job.

The AAO finds that the proffered position does not qualify under section 1 of 8 C.F.R. § 214.2(h)(4)(iii)(A). Notwithstanding the "management analyst" title the petitioner has ascribed to it, the evidence of record does not establish that the petitioner has proffered a position for which the normal minimum entry requirement is at least a master's degree or its equivalent in a particular specialty.

In order to determine whether a petitioner has established that the position it has proffered actually requires the knowledge-application 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 (5th 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.² 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 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 has considered all of the evidence in the record about the position and its proposed responsibilities and duties, including counsel's statements on appeal about areas of responsibility (monthly reporting on the petitioner's relative position in the market; weekly meetings with managers and assistant managers on the implementation of company procedures; weekly financial, budgetary and accounting analysis; definition and creation of business plans, communication with relevant personnel, resource allocation, and maintenance of team productivity and morale; design of questionnaires and other data-gathering media; direction of business and operational strategy aimed at the expanding share of the market; identification of expert resources on business network systems, and initiation and development of business and accounting data bases; analysis of businesses for possible acquisition; and spearheading all expansion and growth projects.)

² 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.

The AAO finds that the petitioner has limited its description of the proffered position to generalized and generic terms that convey neither the range of 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 in the position 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. As so generally described in the record, the duties do not comport with the management analyst occupation described in the *Handbook*, because the *Handbook* indicates that this occupation requires the application of at least a master's degree level of highly specialized knowledge in a distinct specialty that is closely related to the business problems under analysis. Rather, the generalized nature of the proposed duties that is presented in the record suggests a general management position whose performance does not require a master's degree in marketing or any other specific specialty.

Because the evidence of record does not establish that the proffered position is one that normally requires at least a baccalaureate degree or its equivalent in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In determining whether a petitioner has met the degree requirement of the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), 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)).

As above discussed, it has not been demonstrated that the proffered position is a management analyst position as described in the *Handbook*. Furthermore, there are no letters or affidavits from the petitioner's industry or an industry professional association that attests to a routine recruiting and hiring practice.

In his brief on appeal, counsel contends that the record's job vacancy advertisements from other employers were not accorded proper weight, noting that "the five advertisements were for management analysts in the same area of the country, with the same job description and job titles and various similar job titles and descriptions." The AAO finds, however, that these advertisements are not probative.

For application of the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), "parallel positions" status between a proffered position and others in an industry is not determined by similar wording of generalized functions of the positions, but by the degree of similarity between the work involved in the actual performance of the positions. The record's information about both the advertised positions and the one proffered here is too generalized for an accurate comparison of the actual work and specialty-knowledge applications they involve. Further, no evidence establishes that these few advertisements are an accurate representation of an industry-wide educational standard for positions parallel to the one that is the subject of this petition. Accordingly, the petitioner has not satisfied the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, counsel rightly concedes that, as this is the first time the position in question has been proffered, the petitioner cannot meet 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.

Finally, the AAO also finds that the descriptions of the proffered position are too general and generic to qualify the proffered position as a specialty occupation by virtue of complexity, uniqueness, or specialization. These descriptions indicate a variety of general duties, but they do not convey either that the proffered position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty (as required to meet the second alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), or that the specific duties are so specialized and complex that their performance requires knowledge that is usually associated with a baccalaureate or higher degree in a specific specialty (as required to meet the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)).

Because it is not substantiated by the evidence of record, the AAO accords no weight to counsel's assertion that the petitioner "has demonstrated that the nature of the proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a baccalaureate or higher degree." 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 petitioner has not provided the specificity required by the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), to which counsel alludes. That provision provides for the qualification of a position as a specialty occupation if:

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 record describes the proffered position by abstract functions, such as "present[ing] monthly reports of the position of our company in the market against our competitors['] positions"; providing "[w]eekly financial, budgetary and accounting analysis to ensure the proper allocation of resources as prescribed by company policy"; and "study work problems such as organizational changes communication and information flow, inventory control, and cost analysis, and will also suggest long-term business strategies." The petitioner does not illustrate specific matters in its business to which these functions relate, does not define specific tasks that would engage the beneficiary in his actual work, and does not demonstrate or explain how specific tasks or duties would require the theoretical and practical application of the level of highly specialized knowledge that the petitioner contends that the beneficiary must possess.

Counsel has not established that the court cases that he cites require reversal of the director's decision in this case. Likewise, counsel's citation to several AAO decisions is not persuasive. Counsel's citation of previous AAO decisions opinions about positions other than that proffered here is not persuasive. Counsel has not established that the facts of the cited decisions are substantially the same as the facts in the instant case.

Further, AAO non-precedent decisions have no persuasive impact. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding, *see* 8 C.F.R. § 103.2(b)(16)(ii), and the record presently before the AAO does not establish the proffered position as a specialty occupation.

Counsel's statement that he "has submitted over fifteen petitions for management analysts for the H-1B classification and all of them were granted with similar job titles and job descriptions for different employers" is not evidence. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena; Matter of Laureano; and Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Also, the assertions are irrelevant to the merits of this case which must be determined by the evidence within the four corners of the record of proceeding: each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d).

If previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.

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 previous decision of the AAO, dated September 23, 2003, is withdrawn. The appeal is dismissed. The petition is denied.