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U.S. Citizenship
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Services

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FILE: SRC 03 095 52008 Office: TEXAS SERVICE CENTER Date: SEP 27 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, Chief
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 an investment company that presently operates two Dennys restaurant franchises. It seeks to employ the beneficiary as a management consultant and endeavors to classify him 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 stating that the proffered position is a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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:

[A]n 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 are 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.

In determining 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director’s requests for additional evidence; (3) the petitioner’s response to the director’s requests; (4) the director’s denial letter; and (5) the Form I-290B with counsel’s brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a management consultant. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would:

- Provide consulting services in the areas of financial management, budgeting, revenue projections, market research, inventory control, allocation of human resources, employee training and development and investment management;
- Consult with customers and clients to define needs or problems, conduct studies and surveys to obtain data, and analyze data to advise on or recommend solutions, utilizing knowledge of theory, principles, or technology in the management area;
- Consult with clients and customers to ascertain and define needs or problem areas, and determine the scope of investigation required to obtain solutions;
- Conduct studies or surveys on needs or problems to obtain data required for solutions, and analyze data to determine solutions such as installation of alternate methods and procedures, changes in equipment processing methods and practices, modification of machines or equipment, or redesign of products and services;

- Advise clients and employees on alternate methods of solving needs or problems, or recommend specific solutions;
- Negotiate contracts for services; and
- Provide consulting services to management, customers and employees.

The petitioner requires a minimum of a bachelor's degree in business administration with a concentration in management for entry into the proffered position.

To determine whether the duties 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 often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether an industry 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 consultant, the AAO first turns to the *Handbook's* description of management analyst, the occupational title that is most closely related to the proffered position. The *Handbook*, 2006 – 07 edition, at pages 92-93, describes the occupation of management analyst as follows:

As business becomes more complex, the Nation's 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 or telecommunications, while others specialize by type of business function 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. While 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. The occupation of management analyst is a specialty occupation, normally requiring those seeking employment in the private sector to have a master's degree in business administration or a related field. However, while the petitioner has identified its position as that of a management consultant, its description of the beneficiary's duties is so generic and nonspecific that it precludes the AAO from determining precisely what tasks the beneficiary would perform for the petitioner on a daily basis. A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used in the *Handbook* or the *Dictionary of Occupational Titles (DOT)* in discussing an occupational title, e.g., consult with customers and clients to define needs or problems, conduct studies and surveys to obtain data, analyze data to advise on or recommend solutions utilizing knowledge of theory, principles, or technology in the management area; conduct studies or surveys on needs or problems to obtain data required for solutions; and analyze data to determine solutions, such as installation of alternate methods and procedures, changes in processing methods and practices. While the petitioner states that the beneficiary would analyze data gathered and determine solutions such as installation of alternate methods and procedures, it offers no indication of what the petitioner would require of the beneficiary in performing this duty in relationship to its business interests, such as the type of data and/or information to be gathered and analyzed, or the specific purpose for that responsibility. The petitioner states that the beneficiary would provide consulting services to management, customers and employees. The record does not disclose under what circumstances the beneficiary, as an employee of an investment company that presently operates two Denny's restaurants, would provide consulting services to customers, who those customers are or what type of consulting would be provided to the customers. 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. Accordingly, the record does not establish that the offered position qualifies as a specialty occupation under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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) – 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 *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*, and there is no other evidence of record that would serve as proof that the petitioner's degree requirement for the offered position is common to its industry in parallel positions among similar organizations. The petitioner submitted copies of three job advertisements for management consultants, all of which required a bachelor's degree. None of the advertisements submitted, however, are from organizations similar in nature to that of the petitioner and the advertisements are, therefore, of little evidentiary value. Further, the AAO also concludes that the record before it 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. It finds no evidence in the record that would support such a finding. The petitioner states that it is expanding its business operations and plans to add additional franchises and to “build a strip mall at a busy location.” The petitioner did not provide a business plan or additional evidence that it was actively involved in the establishment of new restaurant franchises. Nor did it provide evidence that it is currently involved in the development of land into a strip mall. Simply going on the 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 190 (Reg. Comm. 1972)). Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO now 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 the 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 employee's diplomas. The petitioner states that it previously employed the beneficiary as a management consultant with the beneficiary being granted a TN visa. The record does not, however, establish that the beneficiary was employed for the same position now being offered and that the duties of the two positions are the same. The regulatory and statutory requirements for the TN visa and the H-1B visa are not the same. Further, 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

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.

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 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 petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to 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. In support of this assertion counsel points to the discussion of the occupation in the *Handbook* as proof that the duties of the proffered position meet the specialized and complex threshold of the referenced criterion. He also contends that the complexity of the duties themselves establish that the position is a specialty occupation. The AAO does not agree.

As previously discussed, the proffered position has not been established as that of a management analyst and the *Handbook's* discussion cannot, therefore, be used by counsel as proof of a degree requirement. Further, counsel's characterization of the specialized and complex nature of the duties of the position is not supported by the record. The duties of the proffered position as described are too generic to determine what specific tasks would be performed by the beneficiary. The generic description of the duties of the proffered position discussed under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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 of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner submitted an evaluation of the beneficiary's education and work experience from a credentials evaluation service. That evaluation states that the beneficiary's foreign education and work experience are equivalent to a bachelor's degree in business administration with a major in management from a regionally accredited university in the United States. The evaluation is based on an evaluation of the petitioner's foreign education and work experience by [REDACTED], a college professor at Texas A & M University. Neither evaluation establishes that the beneficiary holds a bachelor's degree. The evaluation issued by the credentials evaluation service includes the evaluation of the beneficiary's work history for degree equivalence purposes. A credentials evaluation service may only evaluate a beneficiary's foreign education for degree equivalence purposes, not past work experience. 8 C.F.R. § 214.2(h)(4)(iii)(C)(3). Further, the record does not establish that Professor Vokurka is an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience. 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). The evaluations submitted are of little evidentiary value and do not establish the beneficiary's qualifications to perform the duties of a specialty occupation. For this additional reason, the petition may not be approved.

The proffered position does not meet any of the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A), and the beneficiary is not qualified to perform the duties of a specialty occupation. Accordingly, the director's denial of the I-129 petition shall not be disturbed.

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 failed to sustain that burden and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.