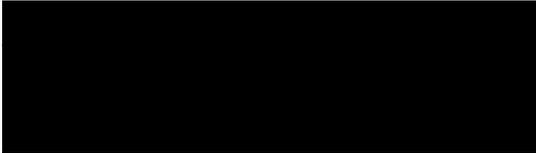




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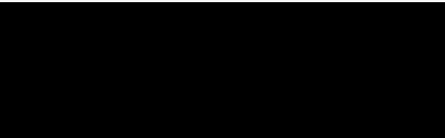
*DZ*

FILE: WAC 02 184 51495 Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2008

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, Director  
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 is a construction company, with four employees and a gross annual income of \$500,000. It seeks to employ the beneficiary as a management analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition based on his determination that the beneficiary was not qualified to perform the duties of a specialty occupation and 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) previous counsel's response to the director's request for evidence; (4) the director's letter informing the petitioner of the ongoing review of evidence in the record; (5) the director's notice of intent to deny; (6) current counsel's response to the director's notice; (7) the director's denial; and (8) Form I-290B.

In submitting the Form I-290B, received on July 8, 2004, current counsel indicates that he will submit a brief and/or evidence within 30 days. As the record contains no brief or additional evidence, the AAO contacted counsel on October 27, 2005 to determine whether he had submitted the promised documentation. As of this date, counsel has not responded. The record is, therefore, complete and has been reviewed in its entirety by the AAO.

Although the director concluded that the petitioner had failed to establish either the proffered position as a specialty occupation or the beneficiary's qualifications to perform the duties of a specialty occupation, the petitioner's appeal responds only to the director's findings regarding the beneficiary's qualifications. Accordingly, while the AAO will review both bases for the director's denial of the petition, it will first consider whether the beneficiary is qualified to perform the duties of a specialty occupation.

In determining whether an alien is qualified to perform the duties of a specialty occupation, Citizenship and Immigration Services (CIS) looks to the petitioner to establish that the beneficiary meets one of the requirements set forth at Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2) -- full state licensure to practice in the occupation, if such licensure is required; completion of a degree in the specific specialty; or experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Further discussion of how an alien qualifies to perform services in a specialty occupation is found at 8 C.F.R. § 214.2(h)(4)(iii)(C), and requires the individual to:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In the instant case, the petitioner has stated that it seeks to employ the beneficiary as a business or management analyst. To determine the educational background required to perform the duties of a business analyst, the AAO has reviewed the discussion of management analysts provided by Department of Labor's *Occupational Outlook Handbook (the Handbook)*, the resource on which it routinely relies for information on occupations and the educational preparation required to perform them. With regard to management analysts seeking private sector employment, the *Handbook*, at page 89, states:

[M]ost 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 . . . .

Therefore, for the beneficiary to be found qualified to perform the duties of a management analyst, the record must establish that he holds a master's degree in business administration or a related discipline, or the equivalent of such a degree.

The beneficiary does not possess a U.S. or a foreign degree required by the specialty occupation. Instead, the petitioner seeks to establish the beneficiary's qualifications to perform the duties of the proffered position based on his combined education and employment experience, as required to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(4)(C).

For the purposes of 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), equivalence to a U.S. baccalaureate or higher degree shall mean the achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty, and shall be determined by one or more of the following requirements at 8 C.F.R. § 214.2(h)(4)(iii)(D):

- (1) An evaluation from 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;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

To establish that the beneficiary holds the equivalent of a master's degree in business administration, the petitioner, at the time of filing, submitted copies of the beneficiary's transcripts from the University of the East in The Philippines and an evaluation of the beneficiary's educational and employment background prepared by e-ValReports in Mukilteo, Washington. The evaluation finds him to hold the equivalent of a baccalaureate degree in business administration, with a major in management, from an accredited university in the United States and to have a master's degree in business administration when his 29 years of employment experience are combined with his educational background. This evidence does not, however, establish the beneficiary's qualifications to perform the duties of a specialty occupation.

In his notice of intent to deny, the director indicated that a field investigation, conducted to ascertain the authenticity of the beneficiary's educational credentials from the University of the East, had found no record that the beneficiary had graduated from this institution. This finding was based on an April 2, 2004 letter from the University of the East's registrar which confirmed that the beneficiary had been enrolled in the College of Business Administration from June 1959 until October 1962, but also stated that the university had no record that the beneficiary had been awarded a degree, as claimed by the petitioner. In response to the director's notice, current counsel submitted a statement from the beneficiary stating that he had been awarded a degree in business administration in March 1963 and another copy of the beneficiary's academic transcripts.

On appeal, counsel contends that that the director erred in finding that the petitioner had failed to establish that the beneficiary held a baccalaureate degree. He asserts that the petitioner has submitted both the beneficiary's transcripts and a copy of his diploma from the University of the East, which have not been shown to be fraudulent, and, therefore, establish the beneficiary's qualifications. However, counsel is incorrect when he states that the petitioner has submitted a diploma showing that the beneficiary was awarded a March 1963 degree in business administration. Although the credentials evaluation report submitted at the time of filing indicates that the evaluator reviewed the beneficiary's diploma, no such document is part of the record before the AAO. The petitioner did not submit a copy of the beneficiary's diploma at the time of filing. Nor did it do so in response to the director's notice of intent to deny. While the copies of the transcripts provided by the petitioner include a statement that the beneficiary "GRADUATED from the four year course leading to the degree of BACHELOR

OF SCIENCE IN COMMERCE major in MANAGEMENT as of March 1963,” they cannot, in light of the information received from the University of the East, establish that he has been awarded a baccalaureate degree, only that he has completed course work toward that degree.

The information provided by the registrar from the University of the East also undermines the reliability of the academic evaluation submitted by the petitioner at the time of filing. As there is no record of the beneficiary being awarded a degree, the AAO will not accept e-ValReports’ statement that it reviewed a copy of the beneficiary’s diploma or its conclusion that the beneficiary holds the equivalent of a U.S. baccalaureate degree in business administration. Doubt case on any aspect of the petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Further, CIS uses an evaluation by a credentials evaluation organization as an advisory opinion only. Where an evaluation is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). The AAO will also discount the e-ValReports’ evaluation of the beneficiary’s 29 years of employment experience as it recognizes the opinion of a credentials evaluation service’s opinion only with regard to the evaluation of education. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Accordingly, the e-ValReport evaluation does not establish that the beneficiary holds a degree equivalency that qualifies him to perform the duties of a management analyst.

The AAO now turns to its own examination of the record to determine whether the beneficiary, when his education, training and experience are combined, may have acquired the equivalent of a master’s degree in business administration and is, therefore, eligible to perform the duties of a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

When evaluating a beneficiary’s qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. The record must also establish that the beneficiary’s training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, that this experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation and that the beneficiary’s expertise in the specialty has been recognized, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

While the record establishes that the beneficiary has four years of undergraduate coursework toward a U.S. degree in commerce or business administration, it does not offer evidence of any kind regarding the beneficiary’s 29-year employment history, which was noted by the petitioner at the time of filing. In its May 2, 2002 letter of support, the petitioner indicated that the e-ValReports’ evaluation was being submitted as proof that the beneficiary’s combined education and employment experience provided him with the equivalent of a master’s degree in business in management. However, as previously discussed, a credentials evaluation service may not evaluate employment experience, and the AAO finds nothing else in the record that addresses the length or nature

of the beneficiary's prior employment. Accordingly, the record does not establish that the beneficiary's education, when combined with his employment experience, qualifies him to perform the work of a management analyst.

The AAO next considers the proffered position and whether the evidence of record establishes it as a specialty occupation.

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 (5<sup>th</sup> 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 business analyst. Evidence of the beneficiary's duties includes: the Form I-129; a May 2, 2002 letter of support from the petitioner; and prior counsel's January 2, 2003 response to the director's request for evidence, including a copy of a job opening notice for the proffered position.

At the time of filing, the petitioner stated it was expanding its operations and required the services of the beneficiary to:

- Devise methods to increase profitability, manage expenses and reduce overhead;
- Analyze statistics, and other types of data, such as annual revenues, and expenditures to develop solutions to decrease overhead expenses;
- Conduct a study of procedures, including organizational changes, communications, information on problems and procedures;
- Analyze data gathered, develop information and consider available solutions or alternate methods of proceeding, taking into account the nature of the business, internal organization, as well as data gained through data collection and analysis;
- Organize and document findings of studies and prepare recommendations for the implementation of new systems, procedures and organizational changes; and
- Gather and analyze data on client preferences through questionnaires and opinion polls, organize findings and prepare recommendations for implementation.

Prior counsel in his January 2, 2003 response to the director's request for further information regarding the duties of the proffered position restated the duties just identified and also indicated that the beneficiary would train personnel in the application of new systems, procedures, and organizational changes. The AAO will not, however, consider this additional duty in its analysis of the proffered position.

The purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot, therefore, offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). As the training responsibility identified by prior counsel in response to the director's request for evidence appears to be a material change to the duties described at the time of filing, the AAO will not consider it.

To determine whether the duties described by the petitioner 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 Department of Labor's (DOL) *Occupational Outlook Handbook (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 business analyst, the AAO turns to the *Handbook's* description of management analyst, an occupational title with similar responsibilities. The work of management analysts is described at pages 87-88:

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 . . . .

[S]ome 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 the proffered position to reflect the type of activities performed by management analysts, i.e., the review and analysis of a business' structure, finances, operations and policies. However, the petitioner's listing of these duties is so generalized 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 have responsibility for devising methods to increase its profitability, manage expenses and reduce overhead, it offers no indication of what specific duties the beneficiary would perform in assuming this responsibility for its business.

Without a description of the actual day-to-day tasks to be performed by a beneficiary, a petitioner cannot prove that these tasks are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent on the beneficiary, as required to establish a proffered position as a specialty occupation under the first criterion. Neither can it satisfy either prong of the second criterion – the degree requirement is common to the industry in parallel positions among similar organizations or the position is so complex or unique that it can only be performed by a degreed individual. In response to the director's request for evidence, previous counsel submitted a series of Internet job advertisements to establish the petitioner's degree requirement as the norm within its industry. However, without a specific description of the proffered position's duties, the petitioner cannot demonstrate that its employment is parallel to that described in these on-line announcements, or that it is more complex or unique than similar non-degreed employment.

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. In response to the director's request for evidence, previous counsel indicated that the proffered position was newly created. Therefore, the petitioner has no employment history on which to establish the proffered position as a specialty occupation.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to prove 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. However, the generalized 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) also makes it impossible to evaluate these duties under the specialized and complex threshold of the fourth criterion. Accordingly, the record does not establish the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the petitioner has not established 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.