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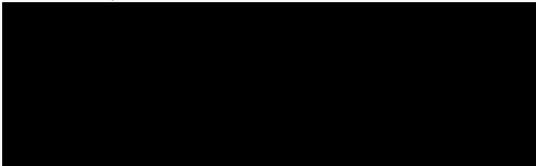
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FILE: WAC 04 093 53638 Office: CALIFORNIA SERVICE CENTER Date: DEC 23 2005

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 states it operates a chain restaurant and an import/export seafood business. It employs ten individuals and seeks to hire the beneficiary as a business operations specialist 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 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; (3) the director's denial letter; and (4) Form I-290B, with counsel's statement. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the 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 operations specialist. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s February 10, 2004 letter of support submitted at the time of filing; and counsel’s June 11, 2004 response to the director’s request for evidence.

At the time of filing, the petitioner stated that it was seeking the beneficiary’s services to improve its internal business management and provide logistical support to its business expansion and development. It indicated that the proffered position would require the beneficiary to:

- Be responsible for analyzing, planning and coordinating the logistical functions and operations of its chain restaurants and the development of an import/export business, involving its entire business cycle, including operational procedure review and analysis, operational management review and analysis, human resources functions, acquisition, distribution, internal allocation, and disposition of resources;
- Develop and implement plans and programs to improve operational efficiency and logistical effectiveness of its chain restaurant operations and import/export business;
- Identify and analyze human resources and work related problems that adversely affect operational efficiency and profits;
- Determine and develop effective remedial techniques to address problems;
- Plan and assist in job-related skills training to improve individual and group work performance; and
- Perform other duties as needed to improve the petitioner’s operational system.

In response to the director’s request for evidence, counsel largely restated these same duties, but also noted that the beneficiary would be responsible for researching new market and business opportunities to expand the beneficiary’s food chain business and for providing information to management in strategic business planning.

The director found the above duties to reflect the employment of an operations research analyst, but denied the petition based on his determination that the record failed to establish that the petitioner's operations were of the scope or complexity to require the services of an operations research analyst or that its business was of the type in which operations research analysts would be employed. The AAO, however, has concluded that the majority of the proffered position's duties are more aligned with the responsibilities of management analysts (*Handbook*, page 88) than with those of operations research analysts. Although both occupations require incumbents to analyze business organizations and operations, the petitioner's description of the proffered position does not indicate that it would require the beneficiary to apply analytical methods from mathematics, science, and engineering, a distinguishing characteristic of operations research analysis. Therefore, the proffered position's duties generally describe the employment of management analysts, although the marketing research responsibilities noted by counsel in his response to the director's request for evidence indicate that the beneficiary would also function as the petitioner's marketing manager (*Handbook*, pages 23-24).

Accordingly, the AAO finds the petitioner to have described the duties of a management analyst/marketing manager, employment that would require the beneficiary to hold a master's degree in business administration or a related field based on its management analysis responsibilities (*Handbook*, page 89). It does not, however, find the record to establish that the petitioner would employ the beneficiary as a management analyst/marketing manager.

Section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b), requires that an H-1B alien be coming temporarily to the United States to perform services in a specialty occupation. Therefore, to establish a proffered position as a specialty occupation, a petitioner must prove not only that the duties of the proffered position are those of a specialty occupation, but also that it will employ the beneficiary in the position described upon his or her arrival in the United States.

The AAO notes that the petitioner has indicated that it requires a business operations specialist to support the expansion of its restaurant chain and to establish an import/export business. A review of the evidence of record, however, finds it to document only the petitioner's operation of a single restaurant in Oakland, California. Although the petitioner's letter of support indicates that it was looking for a second restaurant location in downtown San Francisco at the time of filing, the record contains no documentation of this search or the petitioner's plans to open additional restaurants, e.g., business plans, financial statements or related business correspondence. Nor does the record offer evidence that would support the petitioner's statements regarding its active development of resources and distribution channels in preparation for opening an import/export business. Accordingly, the petitioner has not demonstrated that it operates or has plans to operate a chain of restaurants or that it is in the process of opening an import/export business, the activities that it has stated require the beneficiary's services. Going on record without supporting documentation is insufficient to meet 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)).

In that the record does not establish that the petitioner operates or will operate a restaurant chain or export/import business, the petitioner has not proved that it would employ the beneficiary to perform duties in support of these activities. Accordingly, the petitioner has not established that the beneficiary is coming temporarily to the United States to perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b); 8 C.F.R. § 214.2(h)(1)(ii)(B)(1). Therefore, the proffered position may not be classified as a specialty occupation.

The absence of evidence to establish the business operations that the petitioner has indicated require the beneficiary's services also undermines the petitioner's description of the proffered position's duties. Without documentation of the petitioner's business operations, the duties listed in the record do not constitute a reliable description of the proffered position and will be discounted. As a result, the petitioner also may not establish the proffered position as a specialty occupation under any of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Without a description of the work to be performed by a beneficiary, a petitioner cannot establish that the tasks he or she would perform are of sufficient complexity to impose the minimum of a baccalaureate degree or its equivalent, as required by the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 only a degreed individual can perform it. Absent a reliable job description, the petitioner cannot establish either that the proffered position is parallel to other degreed employment or that it may be distinguished from similar non-degreed employment based on its complexity or unique nature. Further, without a listing of a beneficiary's duties, a petitioner cannot prove that it has a history of employing degreed individuals to perform such duties, as required by the third criterion, or establish these duties as being so specialized and complex that the knowledge required to perform them is usually associated with a degree, the requirement set forth in the fourth criterion.

In reaching its decision, the AAO has considered counsel's statements, in response to the director's request for evidence and on appeal, regarding CIS' routine practice of approving H-1B petitions filed by small businesses seeking business operations specialists. On appeal, counsel notes two such approvals and provides a brief outline of the facts in each case. However, CIS' award of H-1B status in what may appear to be a similar case does not provide a basis for approving the instant petition. CIS is not bound 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). 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). Further, the AAO's authority over the director is comparable to the relationship between a court of appeals and a district court. Even if a director has approved a nonimmigrant petition on behalf of a previous beneficiary, the AAO would not be bound to follow that decision. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D.La.), *aff'd*, 248, F.3d 1139 (5<sup>th</sup> Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish the proffered position as 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.