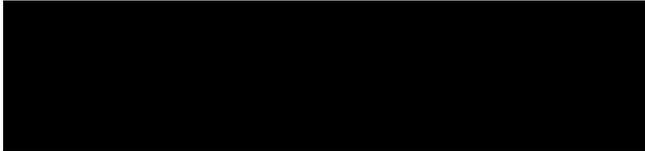


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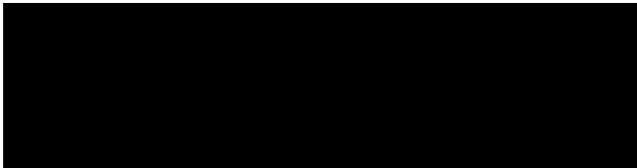
FILE: [REDACTED]  
SRC 04 096 52630

Office: TEXAS SERVICE CENTER Date: OCT 03 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 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 business providing machinery, tools and products for stonework, with five permanent employees. It seeks to employ the beneficiary as an operations research analyst 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 brief, and previously submitted evidence.

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 an operations research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; a January 30, 2004 letter of support from the petitioner, submitted at the time of filing; and counsel’s response to the director’s request for evidence, dated March 1, 2004.

At the time of filing, the petitioner stated that the proffered position would require the beneficiary to:

- Conduct analysis of management and operational problems, and formulate mathematical or simulation models of problems for solutions by computers or other methods; analyze problems in terms of management information, and conceptualize and define problems;
- Study information and select plans from competitive proposals that afford maximum probability of profit and effectiveness in relation to cost and risk; prepare models of problems in the form of one or several equations that relate constants and variables, restrictions, alternatives, conflicting objectives and their numerical parameters; and
- Define data requirements and gather and validate information applying judgment and statistical tests; prepare reports to management defining problems, evaluations, and possible solutions; and design, conduct and evaluate experimental operational models where insufficient data exists to formulate models.

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 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 an operations research analyst, the AAO first turns to the 2004-2005 *Handbook's* description of that occupation at page 112, which states:

*Operations research and management science* are terms that are used interchangeably to describe the discipline of applying advanced analytical techniques to help make better decisions and to solve problems . . . .

The prevalence of operations research in the Nation's economy reflects the growing complexity of managing large organizations that require the effective use of money, materials, equipment, and people. Operations research analysts help determine better ways to coordinate these elements by applying analytical methods from mathematics, science, and engineering. They solve problems in different ways and propose alternative solutions to management, which then chooses the course of action that best meets the organization's goals. In general, operations research analysts may be concerned with diverse issues such as top-level strategy, planning, forecasting, resource allocations, performance measurement, scheduling, the design of production facilities and systems, supply chain management, pricing, transportation and distribution, and the analysis of large databases.

The duties of the operations research analyst vary according to the structure and management philosophy of the employer or client . . . .

Regardless of the type of structure of the client organization, operations research in its classical role entails a similar set of procedures in carrying out analysis to support management's quest to improve performance. Managers begin the process by describing the symptoms of a problem to the analyst, who then formally defines the problem . . . .

Operations research analysts study such problems, breaking them into their components. Analysts then gather information about each of the components from a variety of sources . . . .

With the relevant information in hand, the analyst is ready to select the most appropriate analytical technique. Analysts can use any of several techniques, including simulation, linear and nonlinear programming, dynamic programming, queuing and other stochastic-process models, Markov decision processes, econometric methods, data envelopment analysis, neural networks, expert systems, decision analysis, and the analytic hierarchy process. Nearly all of these techniques, however, involve the construction of a mathematical model that attempts to describe the system being studied . . . .

. . . .

Upon concluding the analysis, the operations research analyst presents management with recommendations based on the results. Additional computer runs to consider different assumptions may be needed before the analyst presents the final recommendation. Once

management reaches a decision, the analyst usually works with others in the organization to ensure the plan's successful implementation.

The AAO finds the above discussion to be reflected in the beneficiary's description of the duties of its proffered position, i.e., the petitioner has described duties normally performed by operations research analysts. However, the duties of the proffered position, as listed, are so generic that they provide no meaningful description of the tasks that the beneficiary would perform for the petitioner on a daily basis. This same lack of specificity is found in the petitioner's response to the director's request for evidence. In that response, counsel simply paraphrased the *Handbook's* discussion of the occupation of operations research analysts, already quoted above, to offer a further explanation of the proffered position's duties.

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 nature of that position and its degree requirements, if any. In the instant case, the record offers a description of the type of work performed within the occupation of operations research analysts, rather than a description of the proffered position's duties as they relate to the petitioner's business. Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. *See Defensor v. Meissner*, 201 F. 3d 384 (5<sup>th</sup> Cir. 2000).

On appeal, as in response to the director's request for evidence, counsel references the Specific Vocational Preparation (SVP) rating of 7 given to the occupation of operations research analyst by the *Dictionary of Occupational Titles (DOT)*. However, as the record does not establish the proffered position as that of an operations research analyst, the *DOT's* findings regarding this occupation are not relevant to these proceedings. Further, 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. Further, the SVP rating of 7 assigned by the *DOT* to the occupation of operations research analyst does not indicate that a bachelor's degree in a specific specialty is required. 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.

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) – 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 resubmits the six Internet job announcements, seven print advertisements, and two letters from businesses employing operations research analysts that were initially offered in response to the director's request for evidence. This documentation does not, however, establish the proffered position as a specialty occupation under the first prong of the criterion.

The six Internet announcements and seven print advertisements discuss degree requirements for employment related to operations research analysis. However, as the evidence of record is insufficient to establish the proffered position as an operations research analyst, the degree requirements discussed in these job

announcements do not establish the proffered position as a specialty occupation under the first prong of the criterion. Moreover, the submitted evidence also fails to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations. As the record does not contain a specific description of the proffered position's duties, the positions described in the advertisements cannot be established as parallel to the petitioner's employment. Further, the Internet and print advertisements do not come from businesses that are similar to the petitioner, a business that sells machinery, tools and products for stone working. Of the Internet announcements, one was published by a winery, another by a management consulting firm and four come from information technology firms. The print advertisements were published by universities, and a research and development organization.

The letters provided by the two employers also fail to prove that the petitioner's degree requirement is common in parallel positions among similar organizations. Although counsel asserts that these businesses are similar to the petitioner, the letters provide no information that would establish them as organizations of comparable size and complexity to the petitioner. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The 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). Further, although both letters briefly outline the duties of their respective operations research analysts, they do not establish, in the absence of a specific description of the work to be performed by the beneficiary, that the positions they describe are parallel to the proffered position. Finally, the AAO notes that neither letter is accompanied by documentation to establish that the firm actually employs an operations research analyst(s) or that the individual holds a degree in industrial engineering, as claimed. Going on record without supporting documentary evidence is not sufficient for the purposes 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)).

The record also fails to 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 the petitioner to have provided no evidence that would support such a finding. Accordingly, it cannot establish 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 cannot establish it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) 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. On appeal, counsel contends that the duties of the proffered position satisfy the criterion's requirements. The AAO does not agree.

As previously discussed, the petitioner's description of the duties of the proffered position is too generic to determine what specific tasks the beneficiary would perform on a daily basis. This generic description, 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 assess whether the proffered position's duties meet the specialized and complex threshold of the fourth criterion. As the petitioner has provided no description of the specific tasks to be performed by the beneficiary, the record contains no evidence to establish the specialized and complex nature of those tasks. Therefore, the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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.