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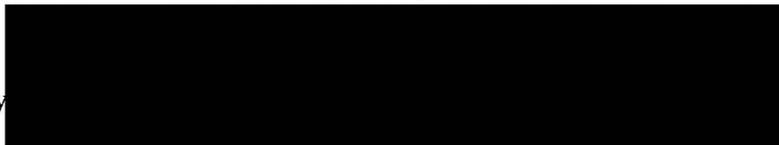
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FILE: LIN 05 138 51065 Office: NEBRASKA SERVICE CENTER Date: **SEP 13 2006**

IN RE: Petitioner:
Beneficiary



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 Director, Nebraska 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 operates a restaurant and employs three personnel. It seeks to employ the beneficiary as a project manager/strategic management analyst. Accordingly, 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's April 8, 2005, request for evidence (RFE); (3) counsel's June 23, 2005, response to the director's request for evidence; (3) the director's July 1, 2005, denial letter; and (4) the Form I-290B, and counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

On July 1, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. Thus, the issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the statutory and regulatory requirements.

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:

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 (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 petitioner states that it is seeking the beneficiary's services as a project manager/strategic management analyst. Evidence of the beneficiary's duties includes: the Form I-129; an April 1, 2005, letter of support from the petitioner; and counsel's June 23, 2005, response to the director's RFE.

At the time of filing, the petitioner stated in its April 1, 2005 letter in support of the petition, that the "Project Manager/Strategic Management Analyst will be responsible for the unit growth and financial success of the CAB [sic]." The petitioner listed the responsibilities of the "strategic management analyst" as:

- Financial auditing competency;
- Risk assessment;
- Resource management and planning;
- Budgeting and financial management skills;
- Project management and tracking;
- System, personal[,] and technology recommendation[s] and implementation;
- [Development of] effective marketing strategies;
- [E]valuation of external cultural socioeconomic influences on target market, and knowledge of Brazilian business practices and liaison as a communication, business, and cultural facilitator.

The petitioner added in a separate job description that the individual in the position of project manager/strategic management analyst:

. . . will emphasize project management, delivery and leadership in the goals of sustaining and developing growth of this company in a highly competitive market. This individual will focus on various projects needed to make informed decisions by management to grow in a viable and responsible manner. This individual will lead and coordinate various personnel with a wide variety of skills for the various projects. This individual will gather, sample, analyze sales and financial data required by management and assist in the implementation of various promotional and growth strategies. Raw product analysis will also be undertaken to stay current with the markets, or gain a position ahead of the markets.

The petitioner also submitted its November 2004 business plan listing its objectives including growing the one unit (restaurant) in Sioux Falls, to five units within the next seven years, establishing a training center for this type of service, and establishing a consulting service for use on a national basis.

On April 8, 2005, the director requested a complete, detailed description of the day-to-day duties to be performed by the beneficiary and if the beneficiary would perform various duties, the percentage of time the beneficiary would spend performing each duty. The director also requested the petitioner's organizational chart showing the employees in their respective positions.

In an undated response attached to counsel's June 23, 2005 letter, the petitioner indicated that the project manager/strategic management analyst position is similar to a cost estimator position as the proffered position requires the beneficiary to assist CBG with the building of a new 12,000 square foot building, travel to new locations to assist with various building costs, and compile and analyze data on all of the factors for the costs associated with internal and external projects; is also similar to an operations research analyst position as the beneficiary will apply her analytical skills in business management, general accounting principles and Brazilian law to assist CBG with its resources; and is further similar to the position of a market and survey researcher as the beneficiary will gather data on other Brazilian grills, analyze prices, sales, and methods of marketing and distribution of the CBG franchise.

The petitioner additionally noted the duties and responsibilities of the position expected during the course of a year, including: daily interpretation of overnight sales data and reconciliation of sales against inventory, and projections; management of the procurement of Brazilian items through functioning as a fiscal intermediary in the Brazilian market; interaction with growing unit(s) regarding audits and fiscal concerns, reviewing corporate protocol for audits; interaction with unit accountants and city and state officials regarding unit(s); interpreting, setting, and adjusting goals for the unit(s); and working with vice-president of operations and administrative coordinator on projects to improve financial performance. The petitioner also included among other things, weekly, monthly, quarterly, and yearly duties relating to the communication of market factors, reconciliations, trending daily results, improving unit financial reporting, identifying risks, making recommendations to management, and evaluating unit personnel, technology, socioeconomic implications, and the impact on immediate and future growth.

The petitioner provided several job announcements as well as excerpts from the Department of Labor's *Occupational Outlook Handbook*, (*Handbook*) regarding the positions of cost estimators, operations research analysts, and market and survey researchers. The petitioner's organizational chart depicted co-owners and investors at the highest point in the organizational structure with the vice-president of operations reporting

directly to the co-owners/investors and the project manager/strategic analyst and an administrative coordinator reporting directly to the vice-president. The organizational chart showed the project manager/strategic analyst position as responsible for accounting and audit services, marketing, foreign relations/regulatory, and expansion services.

On July 1, 2005, the director denied the petition determining that although the majority of the alien's proposed duties appeared analogous to those of a management analyst, the duties associated with the position of management analyst implies that these types of jobs are normally found only within large organizations with complex structures or in specialized management consulting firms providing analytical services based on a particular assignment or project. The director concluded that the size, organizational structure, and business focus of companies similar to the petitioner's size, organizational structure, and business focus are not businesses normally associated with the need for a full-time management analyst.

On appeal, counsel for the petitioner asserts that the director substituted her own business judgment for that of the petitioner when assuming a project manager/strategic management analyst must work at a mega-corporation or a small management consulting business to qualify for this visa classification. Counsel claims that the director failed to apply immigration laws equally to small and large businesses. Counsel notes that the opening date for the CBG facility is the fall of 2005, that it has hired 47 part-time and full-time employees, and that it intends to expand to other cities. Counsel asserts that the individual in the proffered position will determine whether other target markets are viable.

Preliminarily, the AAO observes that the director did not articulately express her reasoning when concluding that the petitioner did not require the services of a management analyst. Based on the discussion of a management analyst occupation in the Department of Labor's *Occupational Outlook Handbook (Handbook)*, such analysts may be employed by both small and large companies. However, the AAO shares the director's concerns regarding the nature of the employment and based on the record before it does not find the petitioner to have established that it would be the beneficiary in a specialty occupation.

Based on the record, the AAO observes that when the petition was filed April 4, 2005, the petitioner discussed the proffered position's responsibilities in general terms rather than providing a detailed description. Although it provided a description in response to the director's request for evidence, the petitioner described duties including travel and interaction with yet undefined new "units." In the absence of documentation to establish the petitioner's expansion to additional sites, these duties do not demonstrate that the proffered position merits classification as a specialty occupation when the petition was filed. A visa petition may not be approved based on speculation of future eligibility or after the petitioner or beneficiary becomes eligible under a new set of facts. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has provided evidence only of its plans to open a restaurant at 2401 South Carolyn Avenue, Sioux Falls, South Dakota.

The initial description of the proffered position's duties also fails to establish the proffered position as a specialty occupation. As observed above, the initial description of the proffered position only includes a general listing of the proffered position's duties. Based on the record, the petitioner had begun building its initial restaurant but had not yet begun to operate the restaurant when the petition was filed. The AAO

determines that this portion of the record is insufficient to establish that the petitioner is offering the beneficiary a position that merits classification as a specialty occupation.

In the initial description of the proffered position, the petitioner hints that the successful candidate for the proffered position would evaluate cultural, socioeconomic influences on a target market, a description that suggests the position would require the services of a market researcher. In the petitioner's statement in response to the director's RFE, the petitioner provided some information seemingly in regard to the current requirements of the proffered position as follows: assisting with the building of a new 12,000 square foot building and compiling and analyzing data on all factors for the costs associated with internal and external projects, duties the petitioner suggested were the duties of a cost estimator; coordinating the effective use of money, material, equipment, and people and assisting CBG with resources, duties the petitioner suggested were of an operations research analyst; and gathering data on other Brazilian grills, analyzing prices, sales, and methods of marketing and distribution of the CBG franchise, duties the petitioner suggested were duties of a market and survey researcher. On appeal, counsel asserts that the individual in the proffered position will determine whether other target markets are viable.

The *Handbook* reports the nature of the work of a market researcher as "[g]athering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales." The *Handbook* reports the nature of the work of a cost estimator as "compil[ing] and analyz[ing] data on all of the factors that can influence costs – such as materials, labor, location, and special machinery requirements, including computer hardware and software." The *Handbook* reports the nature of the work of an operations research analyst as "applying advanced analytical techniques to help make better decisions and to solve problems" and "following a standard set of procedures and conducting analysis to help managers improve performance." Although the petitioner did not initially suggest that the proffered position would be a management analyst position, the *Handbook* reports that management analysts "analyze and propose ways to improve an organization's structure, efficiency, or profits."

The petitioner in this matter borrows from the *Handbook's* descriptions of the occupations of a market researcher, a cost estimator, and an operations research analyst in an effort to establish that the beneficiary would perform this work. A petitioner, however, cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst gathers data, evaluates or analyzes markets; a cost estimator compiles and analyzes data; and an operations research analyst coordinates the effective use of money, material, equipment, and people [to improve performance]. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

In the instant matter, the petitioner has not offered a description of the duties of its proffered position beyond the generalized outline noted above. It has not, therefore, established that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The AAO acknowledges that when the petition was filed, the petitioner was a start up company that wished to hire the beneficiary for her perceived skills in assisting the petitioner to open a restaurant and pursue a potential franchise endeavor.

However, the skills and education of a proposed beneficiary cannot create a specialty occupation. Instead the petitioner must describe the specific tasks to be performed by that alien, to allow a determination that a position qualifies as a specialty occupation. It is not possible to identify those tasks from the information given and the AAO declines to speculate on the specific tasks the beneficiary would perform. Without a reliable description of the position's duties, rather than the skills of the beneficiary, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In that the record does not offer a specific description of the duties the beneficiary would perform for the petitioner's client, the petitioner is also precluded from meeting the requirements of the three remaining alternate criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Without a meaningful job description, the petitioner has not established the position's duties as parallel to any degreed positions within similar organizations in its industry or distinguished the position as more complex or unique than similar, but non-degreed, employment, as required by alternate prongs of the second criterion. The petitioner in this matter does not claim that it previously employed degreed individuals to perform the duties of the proffered position as this is a new position. Thus the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Neither has the petitioner satisfied the requirements of the fourth criterion by distinguishing the proffered position based on the specialization and complexity of its duties.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. 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. Accordingly, the AAO will not disturb the director's denial.

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