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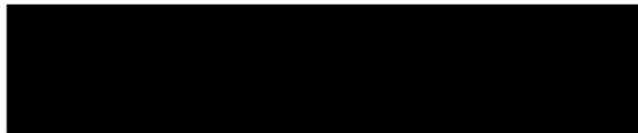
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FILE: WAC 07 145 50889 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2009**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, 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 software consulting and development firm which currently employees one person and has ten subcontractors. It seeks to employ the beneficiary as a financial 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, because he determined that the proffered position was not a bona fide position due to the material changes made by the petitioner to the position's title and duties in response to the director's request for additional evidence (RFE). On appeal, counsel submits a detailed brief addressing the director's findings.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's RFE; (3) counsel's response to the director's RFE; (4) the director's denial letter; and (5) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is two-fold: whether the proffered position constitutes a bona fide position within the petitioner's organization, and whether the petitioner's response to the RFE constituted a material change to the petition.

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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. See *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS 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. 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 seeks the beneficiary's services as a financial analyst. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's undated letter in support of the petition; and the petitioner's response to the director's request for evidence received on August 15, 2007. As stated by the petitioner in the initial letter of support, the proffered position's duties would require the following of the beneficiary:

[The beneficiary] will be responsible for financial planning, analysis, forecasting, teaming and management reporting. He will perform duties and responsibilities commensurate with assigned functional area which may include any combination of the following tasks: Conduct accounting-based research and analysis to provide definitive financial data and advice for use in administering specific fiscal programs and processes.

He will formulate new internal processes and procedures and analytical reports to improve information resources. He will evaluate changes affecting accounting procedures. He will help in repara [sic] special accounting reports as needed and gather data from departments; update periodic reports; analyze statistical data to identify and correct errors and to evaluate general content. As a team member, he will perform review analyses, including accumulation of data, financial modeling, reporting and monitoring of responses and help in ensure [sic] compliance with established procedures, requirements, laws and regulations; completeness of data and adequacy of documentation.

The director requested additional evidence regarding the proffered position in the RFE issued on May 29, 2007. In response, the petitioner expanded on the duties provided in the initial letter of support, and indicated that generally, the beneficiary would work on software projects such as the financial investment solution software project. The petitioner claimed that the beneficiary would be required to "assist the software development team in analysis and mapping of workflow processes," "assist in translating business requirements into highly specified software briefs," and "be the liaison between the management and the development team to communicate data requirements and build new business tools." The petitioner further claimed that the beneficiary would "set the course of budget planning and analysis, financial modeling, financial planning and analysis, and information systems analysis."

Finally, the petitioner claimed that the beneficiary would be instrumental in the development of CarpeLaw, an in-house project of the petitioner. The petitioner claimed that with regard to this project, the beneficiary would perform market research, estimate budget figures, and develop performance measures for new initiatives, among other tasks.

The director concluded that the additional duties stated in the petitioner's response constituted a material change to the petition, and suggested that rather than performing the services of a financial analyst, the beneficiary in the proffered position would be more akin to that of a software developer. On appeal, counsel contends that the beneficiary's duties were not amended as concluded by the director, but rather constitute financial tasks in a software development environment. Upon careful comparison of the duties stated in the request for evidence with the initial statement of duties, the AAO concurs with the director's conclusions.

As correctly noted by the director, the petitioner expanded the beneficiary's duties in its response to the RFE, adding items such as “work on software projects such as the financial investment solution software project.” In sum, the initial description appeared to have the beneficiary focusing solely on accounting-based research and analysis, while the second iteration of the job has the beneficiary working on software projects such as CarpeLaw and assisting the software development team. On appeal, counsel asserts that the beneficiary is merely providing advice from a financial perspective with regard to the software being developed, and is not engaging in software development. The AAO, however, finds that the updated description of duties in response to the RFE is not consistent with the traditional duties of a financial analyst.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. *See* 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot 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. *See generally Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The director denied the petition based on a finding that, due to the material alteration of the duties of the proffered position, a bona fide job offer did not exist. The director found that the record was inconclusive with regard to the nature of the proffered position. Specifically, the director was unable to determine whether the true position proffered to the beneficiary was that of a financial analyst or a programmer/systems analyst.

While the AAO concurs with the director's conclusions, the AAO notes that the director did not perform a complete analysis of eligibility in this matter. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new duties to the job description. Therefore, while the director is correct in noting that material changes to a position's title or duties in response to the request for evidence is not permitted, the director should have also analyzed the job description submitted with the initial petition to determine whether the proffered position was a specialty occupation.

The director's error is harmless because the AAO conducts a *de novo* review, evaluating the sufficiency of the evidence in the record according to its probative value and credibility as required by the regulation at 8 C.F.R. § 245a.2(d)(6). The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO will therefore analyze the duties stated in the initial petition to determine whether they describe a specialty occupation.

To make this determination, the AAO turns to 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 *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In this matter, the *Handbook* confirms that "financial analysts and most personal financial advisors must have a bachelor's degree. Many also earn a master's degree in finance or business administration or get professional designations." However, the AAO notes that the size and nature of the petitioner's business does not support a finding that the beneficiary's primary responsibilities would involve the duties of a financial analyst as contemplated by the *Handbook*.

The duties, as described in the petitioner's initial letter of support, do not reflect the employment of financial analysts whose work is discussed in the 2008-2009 edition of the *Handbook* under the occupation of financial analysts and personal financial advisors,¹ as follows:

Financial analysts and personal financial advisors provide analysis and guidance to businesses and individuals to help them with their investment decisions. Both types of specialists gather financial information, analyze it, and make recommendations. However, their job duties differ because of the type of investment information they provide and their relationships with investors.

Financial analysts assess the economic performance of companies and industries for firms and institutions with money to invest. Also called *securities analysts* and *investment analysts*, they work for investment banks, insurance companies, mutual and pension funds, securities firms, the business media, and other businesses, helping them make investment decisions or recommendations. Financial analysts read company financial statements and analyze commodity prices, sales, costs, expenses, and tax rates in order to determine a company's value and to project its future earnings. They often meet with company officials to gain a better insight into the firm's prospects and to determine its managerial effectiveness.

Financial analysts can usually be divided into two basic types: those who work on the *buy side* and those who work on the *sell side*. Analysts on the buy side work for companies that have a great deal of money to invest. These companies, called institutional investors, include mutual funds, hedge funds, insurance companies, independent money managers, and charitable organizations, such as universities and hospitals, with large endowments. Buy side financial analysts work to devise investment strategies for a company's portfolio. Conversely,

¹ *Occupational Outlook Handbook*, 2008-2009 Edition, at www.bls.gov/oco/ocos259.htm.

analysts on the sell side help securities dealers to sell their products. These companies include investment banks and securities firms. The business media also hire financial advisors that are supposed to be impartial, and as such occupy a role somewhere in the middle.

The duties of the proffered position are clearly not aligned with the *Handbook's* overview of financial analysts. Instead, the AAO finds that most of the duties of the proffered position, which are largely focused on the petitioner's budget and financial operations, reflect the work performed by budget analysts. As indicated by the *Handbook*:²

Budget analysts work in private industry, nonprofit organizations, and the public sector. In private sector firms, a budget analyst's main responsibility is to examine the budget and seek new ways to improve efficiency and increase profits. . . .

* * *

Analysts examine budget estimates and proposals for completeness; accuracy; and conformance with established procedures, regulations, and organizational objectives. Sometimes they employ cost-benefit analyses to review financial requests, assess program tradeoffs, and explore alternative funding methods. They also examine past budgets and research economic and financial developments that affect the organization's spending. This process enables analysts to evaluate proposals in terms of the organization's priorities and financial resources.

* * *

Throughout the year, analysts periodically monitor the budget by reviewing reports and accounting records to determine if allocated funds have been spent as specified. If deviations appear between the approved budget and actual performance, budget analysts may write a report explaining the variations and recommending revised procedures. To avoid or alleviate deficits, budget analysts may recommend program cuts or a reallocation of excess funds. They also inform program managers and others within the organization of the status and availability of funds in different accounts. Before new programs begin or existing programs are changed, a budget analyst must assess the program's efficiency and effectiveness. Analysts also may be involved in long-range financial planning.

The *Handbook* fails to identify a specific degree requirement for employment as a budget analyst. Specifically, the *Handbook* indicates that:

A bachelor's degree usually is the minimum educational requirement for budget analyst jobs, but some organizations prefer or require a master's degree. Entry-level budget analysts usually begin with limited responsibilities but can be promoted to intermediate-level positions within 1 to 2 years, and to senior positions with additional experience.

² *Ibid.*, at www.bls.gov/oco/ocos003.htm.

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[A] bachelor's degree in one of many areas, including accounting, finance, business, public administration, economics, statistics, political science, or sociology is a common requirement. . . .

Based on the above discussion, the proffered position's budget-related duties do not require the beneficiary to hold a baccalaureate degree in a directly related academic field, as required for classification as a specialty occupation. Accordingly, under the statutory and regulatory definitions of specialty occupation requiring a degree in a "specific specialty," the petitioner has not established 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 section 214(i)(1) of the Act; 8 C.F.R. § 214.2(h)(4)(ii).

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the requirement at 8 C.F.R. § 214.2(h)(iii)(A)(1), may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

A review of the evidence of record finds it insufficient to establish the proposed duties as a position that is identifiable with an industry-wide educational standard, or distinguishable, by its unique nature or complexity, from a similar but non-degree-requiring position. Neither counsel nor the petitioner submitted evidence to support such a finding. Again, the *Handbook* reveals that the proffered position is performed by budget analysts, positions which do not require a bachelor's degree in a specific specialty. Therefore, the petitioner has not satisfied the requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to demonstrate that the petitioner has a history of recruiting and hiring degreed candidates for the position. Therefore, the petitioner cannot establish that it normally requires a degree or its equivalent for the position. 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 that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. There is no evidence in the record that would show that the duties of the proffered position rise beyond this level. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

For the reasons set forth above, the petitioner has failed to establish the proffered position as 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 met its burden.

ORDER: The appeal will be dismissed. The petition will be denied.