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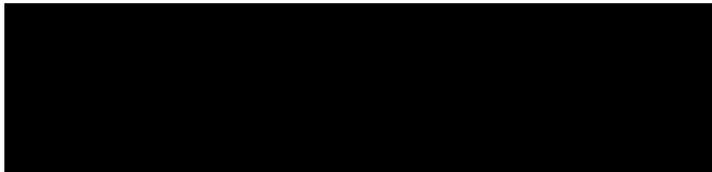
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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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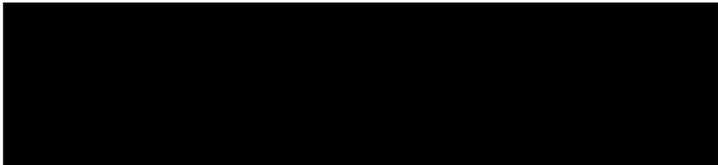


FILE: WAC 08 146 51181 Office: CALIFORNIA SERVICE CENTER Date: **FEB 04 2010**

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.

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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 corporation operates as an Information Technology (IT) company specializing in E-Commerce, data integration, and data warehousing with business intelligence. To employ the beneficiary as a management analyst, the petitioner endeavors to classify him 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 director denied the petition based upon her determination that the evidence of record before her did not establish that the proffered position is a specialty occupation. On appeal, the petitioner asserts that the director's decision should be reversed because it is not supported by the record of proceeding.

The AAO analyzes the specialty occupation issue according to the statutory and regulatory framework below.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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.

Based upon its review of the entire record of proceedings, as supplemented by this appeal, the AAO finds that the totality of evidence regarding the proffered position and the particular business context

in which it would be performed is not sufficient to establish that the management analyst position proffered here is a specialty occupation position.

The “Management Analysts” chapter in the 2008-2009 edition of the Department of Labor’s *Occupational Outlook Handbook (Handbook)* indicates that Management Analysts is not an occupational category characterized by a minimum entry requirement of a least a bachelor’s degree in a specific specialty.¹ As may be gathered from the following excerpt from that chapter, management analysts have a wide range of educational and experiential backgrounds and are not characterized by common degrees. The “Training, Other Qualifications, and Advancement” section of the chapter reads as follows:

Entry requirements for management analysts vary. For some entry-level positions, a bachelor’s degree is sufficient. For others, a master’s degree, specialized expertise, or both is required.

Education and training. Educational requirements for entry-level jobs in this field vary between private industry and government. Many 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 or industry in which the worker plans to consult. Other firms hire workers with a bachelor’s degree as research analysts or associates and promote them to consultants after several years. Some government agencies require experience, graduate education, or both, but many also hire people with a bachelor’s degree and little work experience for entry-level management analyst positions.

Few universities or colleges offer formal programs in management consulting; however, many fields of study provide a suitable educational background for this occupation because of the wide range of areas addressed by management analysts. Common fields of study include business, management, accounting, marketing, economics, statistics, computer and information science, or engineering. Most analysts also have years of experience in management, human resources, information technology, or other specialties. Analysts also routinely attend conferences to keep abreast of current developments in their field.

Other qualifications. Management analysts often work with minimal supervision, so they need to be self-motivated and disciplined. Analytical skills, the ability to get along with a wide range of people, strong oral and written communication skills, good judgment, time-management skills, and creativity are other desirable qualities. The ability to work in teams also is an important attribute as consulting teams become more common.

¹ The AAO recognizes the *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. All references are to the 2008-2009 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/OCO/>.

Certification and advancement. As consultants gain experience, they often become solely responsible for specific projects, taking on more responsibility and managing their own hours. At the senior level, consultants may supervise teams working on more complex projects and become more involved in seeking out new business. Those with exceptional skills may eventually become partners in the firm, focusing on attracting new clients and bringing in revenue. Senior consultants who leave their consulting firms often move to senior management positions at non-consulting firms. Others with entrepreneurial ambition may open their own firms.

A high percentage of management consultants are self-employed, partly because business startup and overhead costs are low. Since many small consulting firms fail each year because of lack of managerial expertise and clients, persons interested in opening their own firm must have good organizational and marketing skills. Several years of consulting experience are also helpful.

The Institute of Management Consultants USA, Inc. offers the Certified Management Consultant (CMC) designation to those who meet minimum levels of education and experience, submit client reviews, and pass an interview and exam covering the IMC USA's Code of Ethics. Management consultants with a CMC designation must be recertified every 3 years. Certification is not mandatory for management consultants, but it may give a jobseeker a competitive advantage.

The AAO's review of the Institute of Management Consultants USA (IMC USA) Internet site (www.imcusa.org), listed at the *Handbook's* "Sources of Additional Information" section, found that a bachelor's degree is one of the requirements for attaining the organization's Certified Management Consultant (CMC®) designation, which IMC USA describes as "conforming to the global standards for management consultants." However, as indicated in the pertinent excerpt below from the Internet site's informational section on the requirements for CMC® designation, there is no requirement that the bachelor's degree be in a specific specialty, and even a candidate without a bachelor's degree can still qualify provided he or she has five years of relevant experience:

- A CMC candidate must have earned a Bachelor's degree.
- A candidate without a Bachelor's degree may apply for certification if they have a minimum of five years of experience as an independent or internal management consultant, provided they can demonstrate an ongoing commitment to professional development in management, the consulting profession, and their area of specialty.

In this occupational context, the AAO finds that the petitioner has not provided sufficient evidence to merit recognition of its particular management analyst position as an H-1B specialty occupation. Based upon its review of the entire record including the matters submitted on appeal, the AAO

concludes that the petitioner failed to establish that the beneficiary would perform specialty occupation services for the period sought in the petition. As will be discussed below, the AAO bases this conclusion on its evaluation of the evidence of record related to the proposed duties and the knowledge required to perform them. The AAO finds this evidence insufficient to satisfy any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), that is, as either (a) a particular position for which the normal minimum requirement for entry would be at least a bachelor's degree, or its equivalent, in a specific specialty (criterion 1); (b) one parallel to those for which organizations in the petitioner's industry that are similar to the petitioner commonly require at least a bachelor's degree, or its equivalent, in a specific specialty (the first alternative prong of criterion 2); (c) a particular position shown to be so complex or unique that it can be performed only by an individual with a degree (the second alternative prong of criterion 2); (d) one for which the employer normally requires at least a bachelor's degree, or its equivalent, in a specific specialty (criterion 3); or (e) one with specific duties so specialized and complex that their performance requires knowledge usually associated with the attainment at least a bachelor's degree in a specific specialty (criterion 4).

In light of the *Handbook* comments noted above, it is incumbent on the petitioner to provide sufficient evidence to establish that the beneficiary would perform the services of a computer systems analyst at a level requiring the theoretical and practical application of at least a bachelor's degree level of knowledge in a computer-related specialty. This the petitioner has failed to do.

In its letter replying to the RFE, the petitioner described the beneficiary's primary duties and estimated weekly time expenditures as follows:

- Conduct organizational studies – 20%
- Evaluate internal processes particularly with regard to recruitment and human resources management – 10%
- Design processes and procedures, prepare operations and procedures manuals - 40%
- Assist management in recruitment, personnel management, human resources issues, improving organizational efficiency and efficacy – 10%
- Liase closely with cutomers, business analysts and team members to understand customer needs and also design staffing strategies tailored for each customer - 20%

The AAO has considered these and all of the comments of the petitioner and its counsel regarding the proffered position and its constituent duties. In doing so, the AAO has taken into account all of the evidence that the petitioner has provided about the nature of its business, particularly in its color-paged promotional materials submitted in response to the RFE. However, as reflected in the duty descriptions quoted above, the petitioner has limited its descriptions of the proffered position and its

duties to generic and generalized terms that convey neither the substantive nature of the projects that would require the beneficiary's services, nor the content and educational level of specialized knowledge that the beneficiary would have to apply in rendering her services. As examples of the record's lack of substantive evidence, the AAO notes that the petitioner does not provide details about the organizational studies and the "internal processes" evaluations that she would conduct. Likewise, no details are provided about the "processes and procedures" that the beneficiary would design, about the particular nature of the assistance that she would provide in recruitment, personnel management, and human resources.

It should be noted that the AAO accords no weight to the assertions of counsel and little weight to the assertions of the petitioner that are not supported by documentary evidence. Examples include counsel's statement (at page 4 of the appellate brief) that "it is generally understood that the only way to initially determine current efficiency levels and then to make improvements and to measure such improvements is to use complicated and sophisticated analytical methodology," and the petitioner's statement (at page 2 of its letter of reply to the RFE) that the five sets of duties quoted earlier in this decision are "indeed highly complex and require a significant degree of sophistication in human resources and personnel management" and that "the level of training required by by current industry standards is at least a Bachelor's degree in Business Administration (or equivalent) with focus on human resource management or similar field, as well as some experience in the field to perform the responsibilities [of the proffered position] in a proper and cost-efficient manner." Going on record without supporting documentary evidence is not sufficient for purposes of meeting 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)). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

As evident in this decision's earlier discussion about the *Handbook's* "Management Analysts" chapter, management analysts do not constitute an occupational group that categorically requires a bachelor's degree or higher in a specific specialty. Based upon the earlier discussed lack of substantive evidence regarding the beneficiary's particular duties and their correlation with a definite educational level of specialized knowledge in a specific specialty, the AAO finds that the evidence of record does not distinguish the proffered position from management analyst positions that do not require at least a bachelor's degree, or the equivalent, in a specific specialty. Therefore, as the petitioner has not established that the particular position proffered here is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong assigns specialty occupation status to a proffered position whose asserted requirement for at least a bachelor's degree in a specific specialty is

common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." First, the evidence of record does not refute the indication in the *Handbook's* "Management Analysts" chapter that there is a wide spectrum of educational credentials acceptable for management analyst positions, including degrees not in a specific specialty closely related to management analysis. Second, the record of proceeding does not contain evidence distinguishing the proffered position as unique from or more complex than management analyst positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).²

² To satisfy this criterion, the record must establish that the recruiting and hiring history was generated by the specific performance requirements of the proffered position. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See generally *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence of record does not convey that the duties of the proffered position are more specialized and complex than those of management analyst positions not usually associated with the attainment of a baccalaureate or higher degree.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

The appeal will be dismissed, and the petition will be denied. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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