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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

D2

FILE:

Office: VERMONT SERVICE CENTER

Date:

JUN 01 2010

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

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the Vermont 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 doing business as a motel and currently employs ten persons. It seeks to employ the beneficiary as a business 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 (RFE); (3) the petitioner's response to the RFE; (3) the director's denial letter; and (4) Form I-290B, with counsel's appeal brief, petitioner's brief, and previously-unsubmitted and previously-submitted documentation. 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.

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), 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.

The petitioner states that it is seeking the beneficiary's services as a business analyst. The petitioner claimed in its letter of support dated March 28, 2008 that it "has undertaken an ambitious project of establishing fine hotel facilities." It further claims to have devised a plan to distribute franchise rights to qualified applicants and intends to provide management services to these franchisees. It claims, therefore, to require the services of a business analyst that can manage its expanding business while maintaining quality control.

Regarding the proposed duties of the beneficiary, the petitioner claimed in the March 28, 2008 letter that the beneficiary would perform the following duties:

Analyze and evaluate all business related data and utilize this information to measure the business performance of our activities, highlighting trends (both positive and negative), recommending areas requiring additional attention and developing early warning systems. The beneficiary will assist in the development of business policies and conduct financial and business-related studies while reviewing all key figures of each project on a cyclical basis, bench marking them and appraising our company while recommending the necessary actions to be taken. Additionally, the beneficiary will forecast the long term impacts of business trends, monitor and report on the accuracy of our forecasting systems regarding payments and returns and analyze and report on those trends within the industry which may have an impact on our organization. Additionally, the beneficiary will oversee the development and execution of the company's strategic alliance, partnership and new market strategies. The beneficiary will have the responsibilities for crafting and executing [the petitioner's] business development and expansion strategies that support the company's business and revenue objectives. He will evaluate, define and secure partnership opportunities that will broaden product line and service offering resulting in increased revenue opportunities for the company. Moreover, he will identify clients, markets and territories for growth and service opportunities that are in alignment with our business goals, direct overall client relationships, from initial engagement through contract negotiation and develop a network of strategic alliances with existing clients and participate in the strategic development of new business while analyzing our clients' unique needs and business models to negotiate deal structures and close integrated opportunities. Furthermore, he will contribute to overall business development strategies and methodologies including development initiatives, recruiting, coaching, supervising and evaluating personnel.

Moreover, the beneficiary will be charged with the preparation of financial and business related analysis and research in such areas as financial and expense performance, rate of return, depreciation as well as working capital and investment. He will analyze market trends and compile and evaluate reports, graphs, and charts of the data developed, assist in the development of business policies and conduct financial and business-related studies while preparing operating budgets based on actual performance, previous budget figures and estimated revenue and implement various budgetary control systems. Furthermore, the beneficiary will be charged with the development of long-range plans in order to achieve continued growth and profitability and evaluate the company's organizational effectiveness, capacity utilization and operating cost containment. Thus, the beneficiary will enable our company to adapt to various market changes and compare and contrast these to the strategies utilized by our competitors and accordingly adjust our organization's business policies. As we deal in high-value goods, the risks factors involved are quite significant. Therefore, the beneficiary will be charged with the development and implementation of business strategies that will minimize all risk factors involved while simultaneously increasing our company's market presence. He will perform SWOT Analysis, identifying strengths, and weakness as well as opportunities and threats with respect to new clients, as this type of analysis will aid us in the identification of opportunities and minimize potential risks. Since our company is

planning to expand by creating branches throughout the United States, we are in need of the beneficiary's expertise at the earliest.

The petitioner concluded by claiming that in order to perform these duties, the incumbent must have, at a minimum, a bachelor's degree or equivalent in Finance, Business Administration, or Commerce.

The director found this initial description of duties insufficient to demonstrate that the proffered position was that of a specialty occupation. Consequently, the director issued an RFE dated August 1, 2008, which requested additional information pertaining to the petitioner's organizational structure and previous hiring practices with regard to the proffered position. In a response received on September 11, 2008, both counsel and the petitioner addressed the director's queries.

In counsel's letter dated September 3, 2008, the criteria for a specialty occupation, as outlined in 8 C.F.R. §214.2(h)(4)(iii)(A) was addressed. Counsel cited the description of the job duties of business analyst as Outlined by the Department of Labor's (DOL) *Occupational Information Network (O*Net)* as evidence that the proffered position qualified as a specialty occupation. Counsel further submitted a more detailed breakdown of the duties of the proffered position, including the percentage of time the beneficiary would devote to each of the described duties. The petitioner, in its letter dated August 29, 2008, described the organizational structure of the company and provided a description of the duties and responsibilities of each of its employees. The petitioner also submitted an organizational chart which demonstrated that the beneficiary would report directly to the general manager. Finally, the petitioner submitted letters from other organizations in the hotel industry to demonstrate that a bachelor's degree or higher was the minimum hiring standard for business analyst positions within the industry.

On October 3, 2008, the director denied the petition. Specifically, the director concluded that the petitioner had failed to demonstrate that a degree in a specific specialty was required for the position. Moreover, the director found no evidence to establish that the industry standard required a bachelor's degree as the minimum requirement for entry into the position of business analyst, and further found that the petitioner failed to establish a history of hiring only degreed individuals for the position.

On appeal, both counsel and the petitioner submit briefs which contain virtually identical arguments to those submitted in response to the RFE. Both contend that the director's decision was erroneous; however, no new evidence is submitted in support of this claim.

As the petitioner has characterized its position as that of a business analyst, the AAO first turns to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, for a discussion of that occupational title. The *Handbook* does not contain an occupation with the specific title of business analyst. Upon review of the described duties, it appears that the proffered position is most accurately categorized as a management analyst, which is described as follows:

As business becomes more complex, firms are continually faced with new challenges. They increasingly rely on *management analysts* to help them remain competitive amidst these

changes. Management analysts, often referred to as *management consultants* in private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits.

For example, a small but rapidly growing company might employ a consultant who is an expert in just-in-time inventory management to help improve its inventory-control system. In another case, a large company that has recently acquired a new division may hire management analysts to help reorganize the corporate structure and eliminate duplicate or nonessential jobs. . . .

Both public and private organizations use consultants for a variety of reasons. Some lack the internal resources needed to handle a project, while others need a consultant's expertise to determine what resources will be required and what problems may be encountered if they pursue a particular opportunity. To retain a consultant, a company first solicits proposals from a number of consulting firms specializing in the area in which it needs assistance. These proposals include the estimated cost and scope of the project, staffing requirements, references from previous clients, and a completion deadline. The company then selects the proposal that best suits its needs. Some firms, however, employ internal management consulting groups rather than hiring outside consultants.

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem that they have been asked to solve. During this phase, they analyze relevant data—which may include annual revenues, employment, or expenditures—and interview managers and employees while observing their operations. The analysts or consultants then develop solutions to the problem. While preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in the industry, and its internal organization and culture. Insight into the problem often is gained by building and solving mathematical models, such as one that shows how inventory levels affect costs and product delivery times.

Once they have decided on a course of action, consultants report their findings and recommendations to the client. Their suggestions usually are submitted in writing, but oral presentations regarding findings are also common. For some projects, management analysts are retained to help implement their suggestions.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO first 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 USCIS when determining these criteria 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)).

The AAO has considered the evidence submitted by counsel to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), including the reference to *O*Net*. The petitioner includes printouts of the positions of Market Research Analyst and Management Analyst. The petitioner makes reference to *O*Net*'s SVP rating, which is between 7 and 8, and the fact that it classifies these positions in Job Zone, 4, suggesting a four year bachelor's degree is required for the position. *O*Net*, however, is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating and job zone classification is meant to indicate only the total number of years of vocational preparation required for a particular position. 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. See the *O*Net* Online Help Center, at www.online.onetcenter.org/help/online/zones, for a discussion of Job Zone 4, which explains that this Zone signifies only that most but not all of the occupations within it require a bachelor's degree.

While the AAO does not find the job description from *O*Net* to be a persuasive source of information as to whether a job imposes a degree requirement, it is aware that the *Handbook*, on which it does rely for such information, indicates that individuals seeking private sector employment as business/management analysts are sometimes required to hold master's degrees in business administration or a related discipline. Specifically, the *Handbook* states:

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

However, the *Handbook* does not indicate that a degree in a specific specialty is required for entry into the position. The *Handbook* states:

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.

A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration or liberal arts, without further specification, does not establish the position as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988).

As the *Handbook* clearly indicates there is no degree requirement in a specific specialty for the occupation of business/management analyst, the AAO concludes that the petitioner has failed to establish that its position is a specialty occupation under the first criterion.

Nor has the petitioner satisfied 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 it can only be performed by a degreed individual. In response to the director's RFE, the petitioner submitted letters from three motels which claimed to employ business analysts with bachelor's degrees or higher. However, these letters have not established a degree requirement in parallel positions. While these letters in fact are from companies similar to the petitioner, they provide little or no context with regard to the manner in which such analysts are employed. Specifically, the letters contain merely one or two sentences and do not describe the nature of the duties of the identified positions. Moreover, they do not state that a bachelor's degree in a specific specialty is required as a prerequisite for the position. The letters submitted in support of this petition fail to demonstrate that the position of business analyst in organizations similar to that of the petitioner actually require 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 has likewise failed to establish that the proffered position is so complex or unique that it can only be performed by a degreed individual. As discussed previously, the description of duties in the record is generalized and summarizes the standard duties outlined in the *Handbook's* description of duties. No independent documentation has been provided to demonstrate that the beneficiary's duties as a business analyst for the petitioner meet this standard. Accordingly, the petitioner failed to establish its position as a specialty occupation under either of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next considers the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): the employer normally requires a degree or its equivalent for the position. 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.

In this matter, the petitioner has failed to submit evidence demonstrating that it has a history of employing degreed individuals for the position of business analyst. The petitioner submits no personnel records or diplomas for previous employees to show that such a trend in hiring has been in effect since the petitioner's incorporation in 2000. In response to the RFE and again on appeal, it is noted that counsel refers to *Tapis Int'l v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000) regarding the consideration of educational equivalency in determining whether a position is a specialty occupation. Counsel contends that the petitioner satisfies this criterion because it requires, and all of its employees hold, bachelor's degrees or their equivalents. This contention lacks substance. First, the petitioner has failed to establish how the facts of the instant case are analogous to the facts in *Tapis Int'l v. INS*. Here, neither the director nor the AAO has failed to recognize that the equivalent of a bachelor's degree in a specific specialty is sufficient to establish a proffered position as being a specialty occupation. Second, in contrast to the broad precedential authority of the case law of a

United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the reasoning underlying a district judge's decision will be given due consideration when it is properly before the AAO, the analysis does not have to be followed as a matter of law. *Id.* at 719.

Accordingly, the petitioner failed to establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner's claimed degree requirement for the proffered position is not evidence of its normal hiring practices.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific duties of its position 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. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO has again reviewed the duties of the proffered position, as described by the petitioner in its initial letter of support and in its response to the director's RFE, to determine whether they reflect a higher degree of knowledge and skill than would normally be required of a business analyst or represent an amalgam of jobs that require different skills and qualifications. Further, the AAO has also considered counsel's statements on appeal regarding the complexity of the proffered position.

Having reviewed the duties of the proffered position, the AAO finds no evidence in the record to show that the responsibilities of the proffered position require greater knowledge or skill than that routinely needed by business analysts who work in demanding and complex situations to promote the goals of the businesses employing them. Further, the job, as described, does not appear to represent a combination of jobs that would require the beneficiary to have a unique set of skills not normally possessed by a business analyst. As a result, the AAO concludes that the petitioner has failed to establish that its proffered position meets the specialized and complex threshold of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Accordingly, the petitioner in the instant case failed to prove by a preponderance of the evidence that the beneficiary is coming to the United States to perform a specialty occupation. A petitioner must establish that a 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). The petitioner has failed to establish that the proffered position qualifies as a specialty occupation.

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.