

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

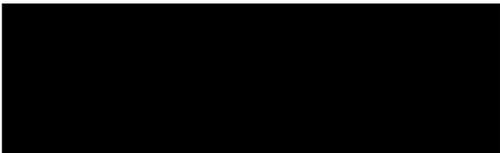
PUBLIC COPY

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

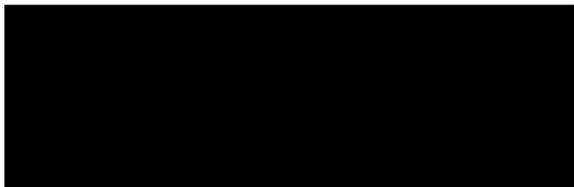


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **SEP 03 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
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 nursing home. It seeks to employ the beneficiary as a senior strategic planning 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 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 director's RFE; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief and copies of documents previously submitted. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 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.

The petitioner’s job description indicates the proffered position entails the following duties and responsibilities in pertinent part:

- Review and analyze organization structure and company policies (15% of time);
- Gather, review and analyze information about business processes and procedures as well as assess the petitioner’s future growth strategies (15%);
- Analyze, synthesize and interpret business data and solve critical business issues as well as develop solutions (15%);
- Interview personnel and conduct observation to ascertain unit functions, work performed, methods, equipment and personnel used (10%);
- Design, develop and evaluate course and training programs for employees and implement new systems, prepare manual, and train workers in use of new procedures and equipment (10%);
- Evaluate strategic business alliances (10%);
- Review forms and reports as well as analyze financial data (10%);
- Develop financial analyses for short and long term plans, working closely with finance, to ensure continued profitability (5%);
- Present detailed report of findings in writing (5%); and
- Develop strategies to keep the petitioner competitive in the marketplace (5%).

In the support letter submitted with the petition, the petitioner stated that the position requires at least a bachelor's degree in business management or a related field. The petitioner submitted copies of the beneficiary's education documents along with a credential evaluation finding that his education is equivalent to a bachelor of business administration degree with a concentration in management from an accredited institution of higher education in the United States.

The petitioner's Labor Condition Application (LCA) indicates that the beneficiary will be paid \$47,258 per year, which is also the prevailing wage listed in the LCA.

On December 12, 2008, the director issued a request for evidence. The director requested that the petitioner submit evidence to demonstrate that the proffered position is a specialty occupation and that the beneficiary maintained a valid nonimmigrant status at the time the petition was filed.

In a response dated January 9, 2009, counsel responded to the director's query. Counsel submitted a copy of the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* section on management analysts along with a copy of the prevailing wages for management analysts from the Foreign Labor Certification Data Center's *Online Wage Library*. The petitioner used the Level 1 amount of \$47,258 per year as its prevailing wage basis, which is the same wage indicated in the LCA.

Additionally, counsel submitted a customer satisfaction questionnaire along with the petitioner's comparative analyses and comparative analyses reports for 2007 and 2008. Counsel does not explain the purpose of submitting this documentation. It is not clear whether someone in the proffered position actually prepared this documentation, or whether the person in the proffered position is expected to analyze, respond to, or otherwise acknowledge this documentation. Finally, the petitioner submitted an organizational chart as well as additional documentation regarding the petitioner's services.

To make its determination whether the employment described above qualifies as a specialty occupation, 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 *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 her denial, the director noted that it is not clear who authored the comparative analysis data provided in response to the RFE and found that the documentation was insufficient to establish that the proffered position is a specialty occupation.

On appeal, counsel argues that the proffered position is closest to the *Handbook's* description of a management analyst. As discussed below, the AAO disagrees with counsel.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of management analysts, as described by the 2010-11 online edition of the *Handbook*. It has taken particular note of the following section of that discussion:

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. In recent years, information technology and electronic commerce have provided new opportunities for management analysts. Companies hire consultants to develop strategies for entering and remaining competitive in the new electronic marketplace. . . .

Management analysts might be single practitioners or part of large international organizations employing thousands of other consultants. Some analysts and consultants specialize in a specific industry, such as healthcare or telecommunications, while others specialize by type of business function, such as human resources, marketing, logistics, or information systems. In government, management analysts tend to specialize by type of agency. The work of management analysts and consultants varies with each client or employer and from project to project. Some projects require a team of consultants, each specializing in one area. In other projects, consultants work independently with the organization's managers. In all cases, analysts and consultants collect, review, and analyze information in order to make recommendations to managers.

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.*

[Emphasis added.] Therefore, management consultants are typically hired from a consulting firm. Although companies may employ internal management consulting groups, the petitioner has not demonstrated that it has a management consulting group or that it has any justification for hiring a full-time management consultant on its staff for a period of three years. According to the *Handbook's* description of the typical way in which management consultants are hired, which indicates that such consultants are usually from an outside firm and are hired to work on a specific project for a specified period of time or employed as part of an internal management consulting group, it would be highly unusual for a nursing home with 69 employees to hire one full-time management consultant as an employee for the duration of the petition.

Although the petitioner asserted that the beneficiary would be heavily involved in research related to expanding and improving its business, the review and analysis of the petitioner's business processes and

procedures and making recommendations for the petitioner to improve do not make him a management analyst. The issue is not whether the proffered position requires the beneficiary to perform organizational analysis, but whether it requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through a bachelor's degree in business management or a related field. As the circumstances under which the petitioner is employing the beneficiary do not indicate that the petitioner's business justifies the hiring of a management analyst as part of its staff on a full-time basis for the duration of the petition, which would be highly unusual for a nursing home employing 69 individuals, and as the petitioner did not provide sufficient supporting documentation to indicate that such organizational research and analysis typical of management analysts would comprise a substantial portion of the beneficiary's time (as indicated previously, the petitioner did not explain the beneficiary's role with respect to the comparative analyses submitted), the proffered position is not that of a management analyst. 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)).

Moreover, the AAO notes that the petitioner's organizational chart does not indicate that it employs any individuals in human resources, public relations, or marketing. Therefore, the AAO finds that the petitioner does not have the staffing to implement recommendations based on the research which would allegedly be performed by the beneficiary.

The AAO further finds that neither the *Handbook* nor any documentation submitted into the record of proceeding indicates that the duties comprising the proffered position are such that their performance would require at least a bachelor's degree, or the equivalent, in a specific specialty.

The AAO therefore finds that there is not sufficient evidence to support a finding that the proffered position is a specialty occupation as defined at 8 C.F.R. § 214.2(h)(4)(ii).

However, even if the petitioner could demonstrate, which it did not do, that the proffered position is a management analyst, the *Handbook's* description of the educational requirements for this occupation are as follows:

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. . . .

[Emphasis added.] Therefore, as the *Handbook* indicates that a wide range of fields are acceptable for management analysts, the *Handbook* does not demonstrate that at least a bachelor's degree or the equivalent in a *specific specialty* is required.

Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 with a requirement for at least a bachelor's degree, in a specific specialty, that 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. The petitioner has not submitted any documentation regarding the minimum requirements listed by other employers for the proffered position. Therefore, the petitioner has failed to establish a degree requirement in parallel positions in organizations similar to the petitioner.

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." As reflected in this decision's previous discussions of the evidence, the petitioner failed to provide supporting documentation to establish that the proffered position meets the sufficient level of complexity or uniqueness to qualify it as a specialty occupation. The petitioner failed to explain the beneficiary's role with respect to the comparative analyses submitted, including the amount of time the beneficiary would be involved with the comparative analyses in relation to his other duties, or how such a role is so unique or complex as to require at least a bachelor's degree in a specific specialty.

On appeal, counsel argues that because the beneficiary will now be promoted from a strategic planning analyst to a senior strategic planning analyst, that this establishes that the proffered position is a specialty occupation. However, as mentioned previously, the prevailing wage used by the petitioner in support of the LCA submitted was for a level one position, which indicates that the petitioner considers the proffered position to be an entry level analyst, rather than a more senior analyst. Additionally, the organizational chart submitted indicates that

the beneficiary is employed as a strategic planning analyst, rather than a senior strategic planning analyst, and, moreover, it does not appear that any other employees will be moving into the position of strategic planning analyst upon the beneficiary's alleged promotion. The petitioner also indicated on the Form I-129 that the proffered position is a continuation of previously approved employment without any changes. Counsel has failed to demonstrate that the beneficiary's duties have changed with his alleged promotion. 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). Moreover, if the promotion took place after the petition was filed, this would constitute a material change. If the duties presented on appeal materially change the scope and nature of the position for which the petition was filed, they will not be considered on appeal. On appeal, 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 the associated job responsibilities. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition and in response to the RFE.

As the record has not established a prior history of 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). To determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's request for evidence, the petitioner asserted that its other top employees, including an Administrator, an Assistant Administrator, a Director of Nursing, and a Finance Department/Accountant all have a bachelor's degree. However, these positions are different from the one proffered in this petition and so this information is not probative for this criterion. The petitioner did not provide evidence that it hired someone in the proffered position prior to the beneficiary.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. As discussed previously, the petitioner has not provided sufficient evidence to justify the employment of a management analyst as part of its staff on a full-time basis or that the duties as proffered reflect a degree of knowledge and skill that can only be attained through a bachelor's degree or equivalent in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business management or a related field is inadequate to establish that a position qualifies as a specialty occupation. 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 management, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558. For this reason also, the petition must be denied.

Finally, the AAO notes that the record indicates that prior H-1B petitions have been approved for the beneficiary. The director's decision does not indicate whether he reviewed the prior approvals of the other nonimmigrant petitions. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, it would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. 55 Fed. Reg. 2606, 2612 (Jan. 26, 1990). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

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