

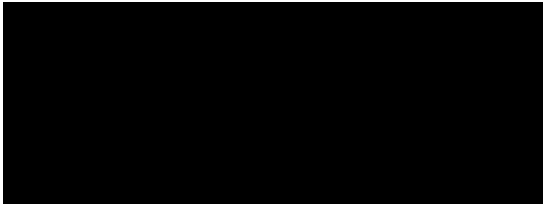
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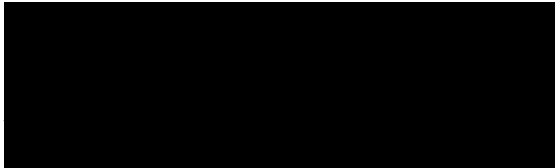
**MAR 11 2004**

FILE: LIN 03 026 50792 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]


PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 214(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1184(e)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
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 is a restaurant that seeks to continue employing the beneficiary, a citizen of Mexico, as a management consultant. The petitioner, therefore, endeavors to classify the beneficiary as a TN-2 alien to perform services as a professional business person pursuant to section 214(e)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (e)(2).

The director denied the petition because the position is not a profession listed in Appendix 1603.D.1 to Annex 1603 of the North American Free Trade Agreement (NAFTA).

On appeal, counsel asserts that the director made an incorrect determination about the nature and duties of the proffered position, and that the position is listed in Appendix 1603.D.1 to Annex 1603 of the NAFTA.

Section 214(e)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1184(e)(2), states:

An alien who is a citizen of Canada or Mexico . . . who seeks to enter the United States under and pursuant to the provisions of Section D of Annex 1603 of the North American Free Trade Agreement (in this subsection referred to as "NAFTA") to engage in business activities at a professional level as provided for in such Annex, may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor. For purposes of this Act, including the issuance of entry documents and the application of subsection (b), such alien shall be treated as if seeking classification, or classifiable, as a nonimmigrant under section 101(a)(15) . . . .

Pursuant to 8 C.F.R. § 214.6(b):

*Business activities at a professional level* means those undertakings which require that, for successful completion, the individual has a least a baccalaureate degree or appropriate credentials demonstrating status as a professional in a profession set forth in Appendix 1603.D.1 of the NAFTA.

The beneficiary of this petition is a citizen of Mexico. Pursuant to 8 C.F.R. § 214.6(d)(2), a petition on behalf of a citizen of Mexico seeking classification as a TN professional shall be accompanied by:

- (i) A certification from the Secretary of Labor that the petitioner has filed the appropriate documentation with the Secretary in accordance with section (D)(5)(b) of Annex 1603 of the NAFTA.
- (ii) Evidence that the beneficiary meets the minimum education requirements or alternative credentials requirements of Appendix 1603.D.1 of Annex 1603 of the NAFTA as set forth in § 214.6(c). This documentation may consist of licenses, degrees, diplomas, certificates, or evidence of membership in professional organizations. Degrees, diplomas, or certificates received by the beneficiary from an educational institution not located within Mexico, Canada, or the United States must be accompanied by an evaluation by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials. Evidence of experience should consist of letters from former employers or, if formerly self-employed, business records attesting to such self-employment; and

(iii) A statement from the prospective employer in the United States specifically stating the Appendix 1603.D.1 profession in which the beneficiary will be engaging and a full description of the nature of the duties which the beneficiary will be performing. The statement must set forth licensure requirements for the state or locality of intended employment or, if no license is required, the non-existence of such requirements for the professional activity to be engaged in.

The job description provided by the petitioner does not adequately establish that the beneficiary would be performing the duties of a management consultant.

The record contains documentation including a statement from the petitioner, a statement from a professional in the beneficiary's industry, a copy of the beneficiary's resume, and evidence that the beneficiary was previously granted TN-2 status.

The director found that the proffered position, despite its title of "management consultant," is really one of general management. The duties of the position, rather than the title, determine whether the position is a professional occupation under the terms of the NAFTA. Counsel asserts that the director applied the information from the Department of Labor's *Occupational Outlook Handbook (Handbook)* in a manner that is unfair to small businesses, such as the petitioner. In reviewing the entry for management analysts in the *Handbook*, it is clear that the position contemplates time-limited duties. The description focuses on hiring outside consultants, rather than in-house employees, such as the proffered position, but the duties are clearly for relatively short-term project-based positions. The beneficiary has been working in the proffered position with the petitioner since 1997. The director determined that the duties performed by the beneficiary were those of a general management employee of the petitioner and there is no provision in the NAFTA for general management positions. Accordingly, the director's decision was appropriate. The proffered position is not eligible to be classified as a profession for purposes of the NAFTA.

The director's decision does not indicate whether he reviewed the prior approval of a TN-2 nonimmigrant petition on behalf of the beneficiary. It is noted, however, that CIS 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). More importantly, the Administrative Appeals Office is never bound by a decision of a service center or district director. *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).

Beyond the decision of the director, there is no evidence of the beneficiary's educational background in the record. Even if the proffered position were determined to be a professional position under the terms of the NAFTA, the petitioner has not demonstrated that the beneficiary is eligible to work in such a position.

After a careful review of the entire record, it is concluded that the petitioner has not shown that the proffered position meets the requirements for the classification sought, as defined under section 214(e) of the Act.

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 that burden.

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