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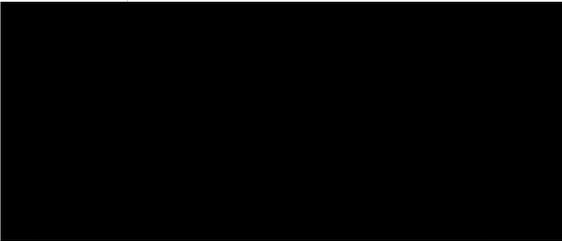


FILE: LIN 03 021 56353 Office: NEBRASKA SERVICE CENTER Date: JAN 05 2005

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The director of the 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 an international import and export company seeks to employ the beneficiary as an international trade specialist. The petitioner, therefore, endeavors to classify the beneficiary 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and additional evidence.

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.

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.

Citizenship and Immigration Services (CIS) 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an international trade specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail researching national and international market conditions and trends in semiconductor and electronics areas; finding distributors and sales partners in the United States; handling South Korea customers; consulting with clients about import-export regulations; participating in bids in South Korea; solving international business problems; and examining and analyzing statistical data to determine marketing and distribution methods. The petitioner stated that the beneficiary is ideal for the proffered position given that he holds a bachelor's degree in business administration from Carroll College located in Montana, United States, and a bachelor's degree in international trade from Dan-Kook University, South Korea.

The director determined that the proffered position was not a specialty occupation. According to the director, the beneficiary's duties are too vague to provide insight into the actual duties, and are not complex enough to require the services of a person with a baccalaureate degree in a specific field of study. The director found unpersuasive the petitioner's statement that one of its employees possesses a master's degree or that it has a history of hiring a candidate with a baccalaureate degree. The director stated that the petitioner did not establish that the industry requires a bachelor's degree or that the nature of the 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.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel narrates the beneficiary's duties and the time allocated to each duty. According to counsel, the beneficiary's duties such as researching international and domestic markets to assist sales, and gathering and analyzing statistical data about the competition for pricing and distribution are an amalgam of those performed by a market research analyst and a business or management analyst. Counsel refers to seven AAO decisions to contend that a management analyst, a market research analyst, an operations research analyst, and a business analyst are specialty occupations. Pointing to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), counsel states that it reports that a bachelor's degree with course work in economics or statistics is fitting for an entry-level position as an economist or market research analyst. Counsel maintains that the proffered position requires the knowledge associated with the attainment of a bachelor's degree in business administration and a bachelor's degree in business administration with a concentration in international trade. Counsel claims that a market research analyst job requires, as a minimum entry-level requirement, a bachelor's degree in economics, statistics, or business administration with course work in economics, statistics, or a related field; counsel submits job postings to support her claim. Counsel explains that due to the difficulty in identifying parallel firms, the job postings reflect a wide range of industries in order to show the standard is to require a bachelor's degree for the proffered position.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers 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; 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 often considered by CIS 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The AAO notes that petitioner's October 23, 2002 letter stated that the beneficiary is offered the position of "[p]roduct engineer." This statement differs from other documentation in the record which indicated that the beneficiary is sought to fill an international trade specialist position. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO observes that on appeal counsel narrates the beneficiary's job duties; however, some of the duties differ from those described by the petitioner. Counsel, for instance, asserts that the beneficiary will adopt "statistical and operation research technology to recommend improvements in operations"; "establish research methodology to gather data," and will "[o]versee execution of contractual obligations." The statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the AAO will not consider the job duties narrated by counsel that differ from those described by the petitioner.

A review of the *Handbook* discloses that the duties of the proffered position are not performed by a market research analyst and a business and management analyst. The *Handbook* reports that one key responsibility of a marketing analyst is to devise methods and procedures for obtaining data; for instance, designing telephone, mail, or Internet surveys to assess consumer preferences, and having trained interviewers under the

marketing analyst's direction. The petitioner never stated that the beneficiary would perform these duties. According to the *Handbook*, management analysts, often referred to as management consultants in the private industry, analyze and propose ways to improve an organization's structure, efficiency, or profits. The *Handbook* reports that analysts and consultants collect, review, and analyze information in order to make recommendations to managers. They define the nature and extent of problems; analyze relevant data, which may include annual revenues, employment, or expenditures; interview managers and employees while observing their operations; and develop solutions to problems. Once a course of action is decided, they report their findings and recommendations to the client, and for some projects, consultants are retained to help implement their suggestions. None of the beneficiary's duties relate to the duties of a management analyst. The beneficiary will not analyze and propose ways to improve the petitioner's organization's structure, efficiency, or profits. Nor will he define the nature and extent of problems and develop solutions to problems.

The proposed duties more closely resemble those of marketing and sales managers. Like the beneficiary who will research market conditions and trends in semiconductor and electronics, and locate distributors and sales partners, the *Handbook* states marketing managers determine the demand for products and services offered by the firm and its competitors; identify potential markets such as business firms or the general public; develop a pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied; and monitor trends that indicate the need for new services and oversee product development. The beneficiary will analyze statistical data to determine marketing and distribution methods. Similarly, the *Handbook* relays that sales managers analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers.

Although the petitioner stated that the beneficiary will solve "problems from international business," the petitioner does not specify the nature of the problems or the time the beneficiary will devote to this duty. Nor does the petitioner describe the time devoted to consulting with clients about import-export regulations. As such, the AAO cannot determine the importance of these duties.

Regarding the educational qualifications of marketing and sales managers, the *Handbook* reveals:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background.

For marketing and sales management positions, the *Handbook* indicates that *some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing.*

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and the 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 fact that only some employers prefer, but do not require, a specific baccalaureate degree, is insufficient to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, international trade specialist.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain the supporting evidence submitted to the service centers in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, counsel's assertions are not sufficient to enable the AAO to determine whether the proffered position is parallel with the positions in the other petitions. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

Counsel's claim that the submitted job postings show that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position is not persuasive. The duties in many of the postings differ from those of the proffered position. For example, Cardinal Health, Automation and Information Services, requires candidates to design and conduct research including surveys, observations, or interviews. Automobile Club of Southern California's job entails conducting member satisfaction studies. The job posting for the senior market research analyst for an international pharmaceutical company requires advanced analysis methodologies, and the development and maintenance of a database and user interface tools. New Hope Natural Media's candidate must develop new research products and analytical techniques. World Savings and Loan requires a candidate to define branch trade areas and monitor trade areas, analyze whether to consolidate and relocate existing branches, and define and understand individual branches that do not perform to expectations. [REDACTED] requires the candidate to plan and field primary research projects involving focus group, survey, interview, and simulated shopping methodologies. [REDACTED] candidate must work with headquarters, division, and regional sales offices to develop systems, using existing IS resources, that provide flexible data analysis tools to enable staff, product distribution, and sales managers to more efficiently and thoroughly manage sales of products. No job duties are described in the Intermedia Advertising Group posting. Furthermore, some postings do not require a bachelor's degree in a specific specialty. The position "Research, Analyst" does not require a bachelor's degree in a specific specialty. Nor do the positions sought by Management Recruiters of [REDACTED] [REDACTED] Postings for ATMI, Inc., Universal Orlando, Beck/Eastwood Recruitment Solutions are truncated, rendering them illegible.

The core duties in the [REDACTED] and Policy Studies, Inc. are somewhat similar to the proffered position. Nonetheless, two postings are insufficient to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, international trade specialist.

The submitted job postings do not establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. Either the nature of the companies in the postings is not disclosed or the companies are obviously dissimilar in size and scope to the petitioner, a small international import and export company with five employees.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reveals that the duties of the proffered position are performed by sales and marketing managers, occupations that do not require a bachelor's degree in a specific specialty.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Although one of the petitioner's employees holds a master's degree in business administration, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS 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 (5<sup>th</sup> Cir. 2000). The critical element is not the title of the position or 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already discussed, the *Handbook* shows that the duties of the proffered position are performed by sales and marketing managers, occupations that do not require a specific bachelor's degree.

The evidence in the record fails to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) which 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. Again, the *Handbook* reveals that the duties of the proffered position are performed by sales and marketing managers, occupations that do not require a specific bachelor's degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is 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.

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<sup>1</sup>The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory language definition, and "might also be read as merely an additional requirement that a position must meet, in addition to statutory and regulatory definition." *See id.* at 387.