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U.S. Department of Homeland Security  
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE  
CIS, AAO, 20 MASS, 3/F  
425 I Street, N.W.  
Washington, DC 20536



File: WAC 02 194 51793 Office: CALIFORNIA SERVICE CENTER

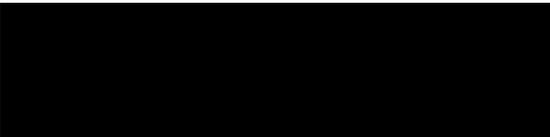
Date: **DEC 24 2003**

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:



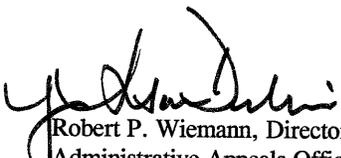
INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, denied the nonimmigrant petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California restaurant with three branches, eighty-five employees and a gross annual income of \$3,000,000. It seeks to temporarily employ the beneficiary as a market research analyst for a period of three years. The director determined that the position was a marketing manager and that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the proffered position is not a marketing manager, but rather a research marketing analyst. Counsel submits further documentation on the industry standard and the petitioner's present business structure and operations.

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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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.

The issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Nebraska Service Center on May 28, 2002, the petitioner described the duties of the proffered position as follows:

Conduct of researches [sic] and studies of market conditions, trends, and consumer behaviors. [The beneficiary] shall be responsible in [sic] gathering and collecting data of competitors, prices, prevailing conditions, marketing strategies and systems. These data shall be analyzed and utilized for management actions, particularly on the pricing, consumer values and preferences, our existing systems and procedures, with the end in view of increasing sales and promoting good will as well as identifying business opportunities for investment, diversification and expansion.

The petitioner also stated that it owned and managed a chain of seafood restaurants catering to middle to upper income level customers. It was established in 1985 and has three branches presenting in Ojai, Thousand Oaks, and Oxnard, California. With regard to its need for a market research analyst, the petitioner stated it was diversifying and expanding its products and services within the next five years. As a result the beneficiary would be undertaking feasibility studies including research on market conditions and trends.

On June 5, 2002, the director requested further evidence. In particular, the director requested a detailed statement on the beneficiary's proposed duties and responsibilities, the percentage of time that the beneficiary would spend performing the specific duties each day, the beneficiary's level of responsibility, hours per week of work, types of employees supervised, and the minimum education, training and experience necessary to do the job. In addition, the director requested copies of the petitioner's present and previous job announcements to establish that the petitioner required its applicants to have, at a minimum, a baccalaureate or higher degree or its equivalent in a specific specialty for entry into the position.

The petitioner submitted the following statement in response to the director's request:

[T]he company is in the process of diversifying and expanding its products and services within the next five years. The position of market research analyst has been created to undertake the feasibility and marketing studies for this project, to include among others, the study of market trends and consumer behaviors, collection and analysis of data on competitors, prices, prevailing market conditions, strategies and systems. Once the data have been analyzed and evaluated, the researcher is expected to develop a comprehensive marketing program and strategy and oversee its implementation; revise, modify and improve the program, with the end in view of garnering a profitable and greater share in the industry.

The work requires a full time job attention of the researcher. Her studies and researches shall be time sensitive and must be completed within a specified time framework and within budgetary constraints. If necessary, management shall appoint subordinates/s or assistant/s to assist her in the speedy completion of her studies.

The petitioner added that a baccalaureate degree in economics, management or business administration would be required for the position, and that, while work experience was not a prerequisite, it was always desired. With regard to the beneficiary's level of responsibility, the petitioner stated that the proffered position was considered a key position by top management and required the complete trust and confidence of the petitioner's president/owner. The petitioner also stated that it had tried outside management consultancy services, but found the services to be costly, and did not provide the petitioner with sufficient ability to control and supervise the research activities.

On June 19, 2002, the director denied the petition. The director determined that the proffered position was a marketing manager position. The director cited to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of marketing managers and determined that this document did not establish that a baccalaureate degree is an industry-wide requirement for entry into the proffered position. Although the director made reference to submitted position announcements, the only position announcements in the record were submitted by the petitioner on appeal. In addition, the director stated that the beneficiary did not appear qualified to perform the duties of the proffered position, but offered no explanation of this statement.

On appeal, counsel submits payroll documents for three separate Sea Fresh companies and states that it has eighty-five employees in all three branches. Counsel states that it has no one

performing research and marketing duties and that no one in its present personnel can satisfactorily perform the intended duties of the proffered position. Counsel asserts that the position to be filled is a market research analyst, not a marketing manager. Counsel further asserts that the petitioner prefers to employ a college graduate to do its market research and analysis, rather than use a marketing manager, and states that all the existing managers should be able to market their own branch; otherwise they have no business staying with the petitioner. Counsel refers to several previous Citizenship and Immigration Services (CIS) approvals of market research analyst petitions, and submits samples of job advertisements in the State of California for market research analyst positions. Counsel states that of 188 market research positions advertised by the *Los Angeles Times* online for the month of June 2002, almost 95% required a baccalaureate degree.

With regard to counsel's reference to previous Citizenship and Immigration Services (CIS) decisions, 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). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve 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). Neither CIS nor any other 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).

Upon review of the record, the petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

**I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position - 8 C.F.R. § 214.2 (h) (4) (iii) (A) (1)**

CIS often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree or its equivalent is normally the

minimum requirement for entry into a particular position. In examining the duties of the position, the proffered position appears to have both market research and analysis duties, as well as duties entailing management and implementation of a marketing plan. The former suggests the position could be a market research analyst for a chain of restaurants, while the latter duties suggest the position could be a marketing manager. To the extent that the petitioner only submitted generic job duties and provided no specific breakdown of the type of any market research on either existing restaurant operations or new products or businesses, or the role of existing managers at the individual branches, the record is not clear as to the actual duties of the position. The director correctly cited to the *Handbook* information on marketing managers, and that information will not be repeated in this proceeding. With regard to research market analysts, the *Handbook* states on page 239:

*Market Research Analysts.* Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Like economists, market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, personal, or mail interview surveys to assess consumer preferences. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate it and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Analysts may conduct opinion research to determine public attitudes on various issues, which may help political or business leaders and others assess public support for their electoral prospects or advertising policies.

With regard to training and academic requirements, the *Handbook* states the following on page 240:

Graduate education is required for many private sector economist and market and survey research jobs, and for advancement to more responsible positions. Economics includes many specialties at the graduate level, such as advanced economic theory, econometrics, international economics, and labor economics. Students

should select graduate schools strong in specialties in which they are interested. Undergraduate economics majors can choose from a variety of courses, ranging from microeconomics, macroeconomics, and econometrics, to more philosophical courses, such as the history of economic thought.

In the Federal Government, candidates for entry-level economist positions must have a bachelor's degree with a minimum of 21 semester hours of economics and 3 hours of statistics, accounting, or calculus.

The *Handbook* clearly establishes that a baccalaureate degree in a specific specialty is the minimum for entry into the market research analyst position. What is less clear is whether the proffered position is a market research analyst position. As stated previously the petitioner only provided generic duties, with no information on how much time the beneficiary would spend in particular duties, or what types of research would be conducted. The critical element in the analysis of this criterion is not the 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.<sup>1</sup> Without more persuasive testimony, the petitioner has not established that a baccalaureate degree is the minimum requirement for entry into the proffered position.

**II. 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 - 8 C.F.R. § 214.1(h) (4) (iii) (A) (2)**

Factors often considered by CIS when determining the industry standard 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." *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)).

The *Handbook's* conclusions about a degree requirement for a market

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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 definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *Defensor v. Meissner* 201 F.3d 388 (5<sup>th</sup> Cir. 2000).

research analyst and a marketing manager position were discussed in the previous section, and shall not be repeated here. In the instant petition, to establish the industry standard, the petitioner submitted eleven vacancy announcements for market research analysts taken off of the Internet. These vacancy announcements are not sufficient documentary evidence to establish an industry standard. For example, several vacancies are for much larger businesses, such as Freddie Mac and Kaiser Permanente. None of the vacancy announcements is for food services companies or restaurants.

In addition, the petitioner submitted no documentation that any professional association has made a bachelor's degree a requirement for entry into the field, nor has it submitted letters or affidavits from firms or individuals in the industry which attest that such firms "routinely employ and recruit only degreed individuals." Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

**III. The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h) (4) (iii) (A) (3)**

The petitioner established that it has not previously hired any other research marketing analysts or marketing manager.

**IV. 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 - 8 C.F.R. § 214.2(h) (4) (iii) (A) (4)**

To date the petitioner has placed no information on the record with regard to the specialized and complex nature of the duties of the proffered position. The job description in the original petition contained generic work duties. The petitioner's subsequent statements in response to the director's request for further evidence did not provide substantive additional detail. This was also the case with counsel's assertions on appeal. Without more persuasive testimony, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h) (4) (iii) (A).

The petitioner has failed to establish that any of the four criteria enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.