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

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 223 52600

Office: VERMONT SERVICE CENTER

Date:

MAR 31 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:

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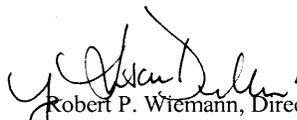
INSTRUCTIONS:

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 the Bureau of Citizenship and Immigration Services (Bureau) 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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a New York international freight forwarding company that has four employees and a gross annual income of \$5 million. It seeks to temporarily employ the beneficiary as a shipping analyst for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) selectively edited a letter submitted to support the petition and arbitrarily denied the petition. Counsel submits additional documentation to support the petition.

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.

The term "specialty occupation" is 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 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 position offered to the beneficiary is a specialty occupation.

In the original petition received by the Service Center on July 5, 2001, the petitioner stated that the beneficiary would work as a "shipping analyst." The petitioner expanded on these duties as follows:

[The beneficiary] will be analyzing all of our shipping operations in order to prepare for ongoing development and company growth. He will be performing research and reviewing freight rates as well as negotiating with freight carriers, steamship lines and airlines to improve cost efficiency. He will be responsible for the selection of the most effective shipping method as well as for the maintenance and updating of shipping operations and lists. Using this data, he will be making appropriate decisions for consolidation and transport. He will also act as liaison with customs brokers for appropriate customs clearance as well as researching and updating lists of flights and vessels to and from Turkey, Europe and the United States.

The petitioner also stated the beneficiary holds both a bachelor's degree in marine engineering from Istanbul Technical University as well as a master's degree from the State University of New York Maritime College at Fort Schuyler in

transportation management. The petitioner submitted a diploma as documentation of the beneficiary's completion of the graduate program in transportation management. In addition the petitioner submitted excerpts from *Shipping Digest* identified as the national shipping weekly of export transportation.

On September 17, 2001, the director requested further evidence to establish that the proffered position was a specialty occupation. In particular, the director asked for an additional detailed statement of the beneficiary's proposed duties as they specifically related to the petitioner's operations. The director also asked the petitioner to describe a typical workweek for the beneficiary. In addition, the director asked for evidence as to educational requirements for employees in similar positions, and more evidence as to the minimum educational requirements for the proffered position within the shipping industry.

In response, the petitioner submitted a letter from [REDACTED] Director of the graduate department of Maritime College. In the letter, [REDACTED] listed the duties of the proffered position, as explained to him, as the following:

Entering into confidential contracts with steamship lines, and negotiating the terms and conditions accordingly with freight customer; analyzing, and selecting transportation modes of time-sensitive cargo; maintaining, and managing shipping operations, including cargo insurance terms and assigning the most effective shipping method; evaluating month end reports, and performing, and developing strategies to maximize profit, minimize cost.

[REDACTED] further described the coursework for the master's program in transportation management, as follows:

Systems analysis and operations research, economic analysis, organizational management, fleet management, ocean marine cargo insurance, managerial statistics, port and terminal management.

In addition, Professor [REDACTED] stated: [The beneficiary's] position is "clearly a professional one requiring the minimum of a bachelor's degree, if not more appropriately, a master's degree."

The petitioner also stated that a typical workweek of the beneficiary would consist of the following duties in addition to the ones already identified in the petition:

Management of air and ocean documentation for cargo advices, billing, track and trace, reviewing cargo load lists; quoting rates as per customer requests on both domestic and international freight[,] reviewing customer requests and arrangements; providing approvals for ship loading of freight out of the port of origin through coordination with actual buyers, arranging vessel sailing schedules with customers, followed by analysis of steam ship line freight management and weekly reports; issuing freight releases on the basis of the credit lines and weekly reviews of all data and reports for generation of required statistics.

Finally the petitioner asserted that it understood the criteria laid out in 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean that the petitioner had to establish either that the company required a bachelor's degree or its equivalent or that the degree requirement is common to the industry. With regard to previous employees who performed the beneficiary's duties within the petitioner's company, the petitioner stated the following:

Our company was founded in 1998 and [the duties of the beneficiary] were originally performed by the owner of the company who has a master's degree in computer science and at least ten years experience as an executive in the freight forwarding field. The job was next performed by an individual with the same master degree from the same institution [as the beneficiary] and the Service approved this employment as an H-1B.

The petitioner submitted no further documentation to support the statements contained in either Professor [REDACTED] letter or the petitioner's cover letter.

On March 19, 2002, the director denied the petition. In his decision, the director pointed out that documentary evidence to support the petitioner's statements had been requested. The director viewed the letter from Professor [REDACTED] as an opinion that lacked documentary evidence to support the letter's statements with regard to the proffered position being a professional one that required the minimum of a bachelor's degree for entry into the position.

On appeal, counsel asserts that the director's decision appears to be based solely on a refusal to accept the opinion letter submitted by Professor Weiss. Counsel asserts that the director

omitted substantive parts of Professor [REDACTED] letter that would have lent support to the petition. Counsel asserts that the letter from the maritime school's director fulfills the requirements of "8 C.F.R. § 214.2 (h)(C)(ii)," with regard to [REDACTED] being a recognized authority. Counsel also asserts that the authority of an academic expert should be acceptable in defining the requirement for a professional or specialty occupation if the academic expert's authority is acceptable for determining the criteria needed for a degree to perform such a specialty occupation.

In addition, counsel maintains that since the Bureau did not comment on the remainder of the evidence submitted by the petitioner, namely, the letter submitted by the petitioner that described a typical work week and that expanded on the beneficiary's duties, this evidence is then found to be acceptable. Furthermore, counsel submits ten job vacancy announcements taken from the Internet for various positions as evidence that a bachelor's degree in a similar or related field as well as experience in the field is required for the proffered position. The majority of job vacancy advertisements submitted by counsel are for transportation managers, with one advertisement for an ocean sales manager.

The Bureau 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.

The Department of Labor's *Occupational Outlook Handbook, (Handbook)* 2002-2003 edition, on page 595 states the following generic information with regard to transportation managers:

Plan, direct or coordinate transportation, storage or distribution activities in accordance with governmental policies and regulations. Includes logistics managers. . . . Most significant source of training: Work experience in a related occupation.

The petitioner's job descriptions for the instant petition provide more information on duties involved in maritime shipping and in particular on the analytical part of the proffered position. For example, the petitioner's initial job description mentioned "analysis of all shipping operations to prepare for ongoing development and company growth." The additional information provided in response to the director's request for further information, while mentioning operational aspects of the job, also listed "analysis of steamship line freight management and weekly

reports and weekly reviews of all data and reports for generation of required statistics." In addition, the description of duties outlined by Dr. Weiss, the graduate school director, provided more clarification on the duties of the proffered position and the maritime shipping industry. His description mentioned "negotiating the terms and conditions with freight customers, analyzing and selecting transportation modes of time-sensitive cargo, evaluating month end reports, and performing and developing strategies to maximize profit, and minimize cost." The analytical and statistical duties appear to have some overlay with the *Handbook* classification of market or business research analyst, and with an operations research analyst. For example, the *Handbook* on page 239 states the following: "market, or marketing, research analysts are concerned with the potential sales of a product or service." The nature of the petitioner's business is to provide a service, maritime shipping, and according to the instant petition, one responsibility of the beneficiary appears to analyze month end reports and develop strategies to maximize profit.

With regard to operations research analysts, the *Handbook* on page 176 states:

Regardless of the type of structure of the client organization, operations research in its classical role entails a similar set of procedures in carrying out analysis to support management's quest for performance improvement.

With regard to educational requirements, the *Handbook*, on pages 176 and 177, states:

Employers generally prefer applications with at least a master's degree in operations research, engineering, business, mathematics, information systems, or management science, coupled with a bachelor's degree in computer science or a quantitative disciplines such as economics, mathematics, or statistics.

To the extent that the petitioner did not provide a specific breakdown of the beneficiary's duties, the record is not clear as to how much time the beneficiary would spend in the analytical and statistical duties, as opposed to more clerical functions, such as reviewing cargo lists. Without such a breakdown, the record lacks sufficient information to evaluate whether the proffered position contains enough operational or analytical elements distinct from the transportation manager classification to determine that the proffered position is a specialty occupation.

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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ Without more persuasive evidence, neither the petitioner's descriptions of the position nor the *Handbook* support that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the shipping analyst position.

Factors often considered by the Bureau when determining the industry standard include: whether the DOL's *Occupational Outlook 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 information contained in the *Handbook* has already been addressed previously and will not be repeated here. With regard to letters or affidavits from firms or individuals in the industry, the letter from the director of the graduate program at the Maritime College stated "a master's degree from this institution in transportation management is frequently the underlying credential needed to perform duties for similar companies of a similar nature." While the director of the graduate program at the Maritime Academy is certainly qualified to comment on jobs obtained by graduates of his program, his statement does not establish that logistics and international freight forwarding companies employ and recruit only degreed individuals. (Emphasis added.) The Bureau maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). To the extent that the record does not reflect documentation with regard to other degreed individuals working as maritime shipping or freight forwarding analysts on a

¹ 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 (5th Cir. 2000).

nationwide basis, the petitioner has not established this criterion.

In addition, the petitioner submitted ten job vacancy announcements. Six of the job announcements are for transportation manager positions, while others are for a freight forwarding manager, an operating manager or transportation specialist. Only one job vacancy specifically mentions maritime shipping and non-vessel-operating common carriers (NVOCCs), a concept that the petitioner mentions in the *Shipping News* materials it placed on the record. Airbourne Express has a position for District Sales Manager. This person would sell ocean freight forwarding services to companies within the State of Michigan. This job is not entirely analogous to the proffered position as the beneficiary does not appear to be selling freight services, but rather serving as a middleman between steamship lines and airlines and freight customers in negotiating contracts, and rates and identifying the most efficient manner of shipping goods among Canada, the United States, and Turkey.

The educational requirement for the Airbourne Express position is a four-year college degree with preferred candidates having a minimum of 5 years ocean transportation sales with NVOCCs. No specific degree is listed. Furthermore, while the submitted job advertisements document that a college degree and extensive experience, or extensive experience alone can fulfill the requirements for entry into transportation management, they do not appear to establish that the baccalaureate degree or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the shipping analyst position. (Emphasis added.)

With regard to the third criterion, namely that the employer requires a degree or its equivalent for the proffered position, the petitioner stated in its letter to the director that the previous employee who held the shipping analyst position had a bachelor's degree in transportation management from the Maritime Academy in New York. However, the record contains no documentation to establish this fact. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence, the petitioner has not established this criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the final criterion, namely that 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 petitioner has provided numerous details with regard to the proffered position. Some details would support a more analytical position, while others, such as updating shipping lists and tracing shipments indicate more clerical duties. Without a more thorough breakdown of the proffered position as to both analytical and clerical duties, the petitioner has not established the specialized and complex nature of the duties to be performed by the beneficiary.

The petitioner has failed to establish that any of the four factors 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.

On appeal, counsel states that Dr. Weiss' letter "fulfills the requirement of 8 CFR 214.2(h)(C)(ii) as to the definition of 'recognized authority'." The regulation to which counsel refers, however, is 8 C.F.R. § 214.2(h)(4)(ii), which defines the term "recognized authority" for the purpose of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i). Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i), a beneficiary may establish that he or she has recognition of expertise in the specialty occupation by submitting letters from two recognized authorities in the same specialty who can attest to the beneficiary's expertise. Because the director denied the petition on the nature of the proffered position, not on the beneficiary's qualifications, it is irrelevant to this proceeding whether Dr. Weiss can be considered a recognized authority pursuant to 8 C.F.R. § 214.2(h)(4)(ii) for the purpose of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i). Accordingly, Dr. Weiss' letter shall not be discussed further.

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.