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**U.S. Citizenship
and Immigration
Services**

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

APR 06 2005

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 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reopen or reconsider. The motion will be granted. The previous decision will be affirmed. The petition will be denied.

The petitioner is a wholesaler and distributor of shoes, with five employees. It seeks to hire the beneficiary as an operations/marketing analyst. The director denied the petition based on his determination that the proffered 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; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; (4) Form I-290B, with additional documentation, appealing the director's denial; (5) the AAO's dismissal of the appeal; and (6) Form I-290B, with additional documentation, submitting counsel's motion to reopen or reconsider. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job 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 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 (5th Cir. 2000). The critical element is not the title of the position nor 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.

The petitioner states that it is seeking the beneficiary's services as an operations/marketing analyst. Evidence of the beneficiary's duties includes: the Form I-129; the June 20, 2002 letter of support from the petitioner; and counsel's July 3, 2002 response to the director's request for evidence. These duties, as described by both the petitioner and counsel, are as follows:

- Analyze and coordinate the logistical functions of the company, leading to the design and formulation of proper operation systems, using computers, electronic equipment and software;
- Formulate and apply optimizing methods using computers to develop and interpret information that assists management with decision making, policy formulation, administrative and marketing functions, oversight of internal workflows and organizational development;
- Conduct quantitative analyses of information on sales performance, inventory control, credit building, A/R collection; assist in customer service and handle pricing support; and
- Coordinate and maintain the database for office, warehouse, accounting and administration systems.

To determine whether the duties just described are those of 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; 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 Department of Labor's (DOL) *Occupational Outlook Handbook (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 his motion, counsel states that the duties of the proffered position combine those of an operations research analyst, business analyst and a market research analyst. The AAO does not agree. The duties of the proffered position do not describe the work of individuals employed in these occupations. Management analysts identify and propose ways to improve an organization's structure, efficiency, or profits. Market researchers focus on the potential sales of a product or service, gathering data on the marketplace in which that product or service will compete. Operations research analysts apply advanced analytical techniques -- most involving the construction of mathematical models -- to identify better ways for businesses to coordinate their use of money, materials, equipment and people. The proffered position requires the beneficiary to a) design and develop the automated systems and software needed to coordinate the logistical functions of the petitioner's business and generate the information it needs for its business decisions; and b) maintain the petitioner's database(s) for its office, warehouse, accounting and administrative systems.

However, while the position is not that of an operations research, business or market research analyst, the AAO finds counsel's statements on appeal regarding the analytical nature of the proffered position's duties to be persuasive. Further review of the analytical duties linked by the petitioner to the design, structuring and maintenance of its operating systems leads the AAO to revise its November 13, 2003 assessment of the proffered position as combining the duties of marketing and sales managers and systems administrators. It now concludes that the full range of duties described by the petitioner fall within the occupation of systems administrator, discussed at page 103 of the 2004-2005 edition of the *Handbook*:

Network or computer systems administrators design, install, and support an organization's LAN (local-area network), WAN (wide-area network), network segment, Internet, or intranet system. They provide day-to-day onsite administrative support for software users in a variety of work environments, including professional offices, small businesses, government, and large corporations. They maintain network hardware and software, analyze problems, and monitor the network to ensure its availability to system users. These workers gather data to identify customer needs and then use that information to identify, interpret, and evaluate system and network requirements. Administrators also may plan, coordinate, and implement network security measures.

Systems administrators are the information technology employees responsible for the efficient use of networks by organizations. They ensure that the design of an organization's computer site allows all of the components, including computers, the network, and software, to fit together and work properly. Furthermore, they monitor and adjust performance of existing networks and continually survey the current computer site to determine future network needs. Administrators also troubleshoot problems as reported by users and automated network monitoring systems and make recommendations for enhancements in the implementation of future servers and networks.

While the AAO notes that the petitioner intends to require the beneficiary to perform several duties that initially appear unrelated to the design, development or maintenance of its computer systems -- ongoing quantitative analysis of the petitioner's sales performance, inventory control, credit building, and A/R collection; assistance with customer service; and the handling of price support -- counsel has characterized them as "routine job duties for analyzing, updating and controlling business operations and performance records" Accordingly, the AAO views these responsibilities as collateral duties of the beneficiary's

general responsibility for designing and operating automated support systems that will assist the petitioner with “decision making, policy formulation, administrative and marketing functions, oversight of internal workflows and organizational development.”

The AAO now turns to the *Handbook* for information on the education and training that may prepare individuals for employment as systems administrators. The educational requirements for employment as a systems administrator are described by the *Handbook* at page 104:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist or systems administrator For systems administrators, many employers seek applicants with bachelor’s degrees, although not necessarily in a computer-related field.

Many companies are becoming more flexible about requiring a college degree for support positions because of the explosive demand for specialists. However, certification and practical experience demonstrating these skills will be essential for applicants without a degree. Completion of a certification-training program, offered by a variety of vendors and product makers, may help some people to qualify for entry-level positions. Relevant computer experience may substitute for formal education.

In that the *Handbook* describes no specific degree requirement for entry-level employment as a systems administrator, the AAO concludes that the proffered position does not constitute employment that normally requires job applicants to hold a baccalaureate or higher degree, or its equivalent. Accordingly, the AAO finds that the position does not qualify as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In response to the director’s request for evidence, counsel submitted material from the DOL *Online Wage Library* showing the occupation of market research analyst to have a job zone rating of 4. As the AAO has determined that the proffered position is not that of a market research analyst, this material is not probative for the purposes of this proceeding. However, the AAO also notes that the *Online Wage Library* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. Further, a job zone rating of 4 does not indicate that a bachelor’s degree in a specific specialty is required.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4) -- establish that a degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In response to the director’s request for evidence, counsel submitted five Internet job postings to establish the petitioner’s degree requirement as the norm within its industry. However, these announcements do not satisfy the requirements of the criterion’s first prong, i.e., they do not establish that a degree requirement is common in parallel positions among similar organizations.

As previously noted in the AAO's November 13, 2003 decision, the information provided in the Internet job postings submitted by counsel does not establish that these organizations are similar to the petitioner in size or scope. Instead, they represent the employment needs of an unidentified financial services business, an unidentified retailer, a research firm, and a provider of tax-preparation software. Further, none of the announcements establishes that the employment advertised is parallel to the proffered position. Three of the announcements describe jobs that require a successful applicant to assume a managerial role. The fourth offers no description of the job's duties and the fifth outlines employment that does not include the type of systems analysis to be performed by the beneficiary.

In support of his motion, counsel submits nine additional Internet job postings to establish the petitioner's degree requirement. However, these listings, like those previously provided, fail to meet the requirements of the first prong of the second criterion. Again, the information in the postings regarding the nine employers -- a contractor providing logistical support to the U.S. military in Iraq, a communications firm, a home products manufacturer, an unidentified manufacturing business, an invoice presentation and remittance-processing service, a news corporation, an asphalt refining company, an automotive marketing and communication research firm, and an online catalog business selling home fashions, apparel and gift brands -- does not establish them as being similar to the petitioner. While the online retail business is clothing-related, its size and its multiple companies distinguish its operations from those of the petitioner. As to the positions advertised, three offer no description of the duties of the employment advertised and, therefore, cannot be compared to the proffered position. Of the six job postings that do outline the duties of the positions advertised, none describes employment requiring a successful job applicant to design and structure an employer's operating systems.

The AAO notes that counsel specifically asserts that the duties of the operations officer position advertised by the U.S. military contractor are similar to those of the proffered position. He further identifies the key duties of the position of operations analyst, announced by the communications firm, as the same as those identified by the petitioner. The AAO, however, finds nothing in the listing of duties for the operations officer that indicates that a successful job candidate would be required to analyze, structure and integrate the automated systems described in the posting. As for the operations analyst position, the Internet announcement offers no meaningful description of the job's duties. It states only that the operations analyst will "provide critical information and analysis to management in order to improve cost and service efficiency of operations." While this may serve as a generic statement of the operations analyst's role within the employing company, it does not provide information as to the specific tasks/duties that will be assigned to the analyst in developing the critical information and analysis needed.

Counsel's motion also states that the goals of the employer seeking a supply chain analyst/buyer are precisely those of the petitioner -- "to drive continuous cost improvements and help reduce inventories while improving customer service levels through effective planning for the organization." However, while the goals of this employer may be identical to those of the petitioner, its industry and the duties of its proffered position are not. Rather than a wholesaler and distributor of clothing or clothing-related merchandise, it is a manufacturer of home products to the building industry. Rather than describing a position in which an applicant must structure and integrate its operating systems, its Internet posting identifies the supply chain analyst/buyer as "a key player in developing raw material requirements for the east coast operations using MRP planning tools

as part of a fully integrated ERP manufacturing software system.” Therefore, this job posting neither comes from an organization similar to the petitioner, nor describes a position parallel to the proffered position. Further, the announcement states only that the position requires the successful applicant to have a bachelor’s of science degree, rather than a degree in a field directly related to the position, as required by CIS.

The AAO has also reviewed the record before it to determine whether the petitioner has established its proffered position as a specialty occupation under the second prong of this criterion -- the position is so complex or unique that it can be performed only by an individual with a degree. As it finds no evidence in the record that addresses this alternative language, it concludes that the petitioner has failed to meet either of the second criterion’s requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific 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.

To determine a petitioner’s ability to meet the third criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. In the instant case, counsel, in his response to the director’s request for evidence, indicated that the proffered position is new to the petitioner. Therefore, the petitioner has no past hiring practices with regard to the position and cannot establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Although neither the petitioner nor counsel has asserted that the proffered position meets the requirements of the fourth criterion, the AAO has again reviewed the duties of the position to determine whether the responsibilities involved require a higher degree of knowledge and skill than would normally be expected of a systems administrator. This review has found no reason to conclude that the responsibilities are any more specialized or complex than those normally performed by individuals who design, develop and maintain automated systems for U.S. businesses. Therefore, the AAO concludes that the proffered position is not a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

In support of his motion, counsel asserts that CIS’ approval of certain H-1B cases for operations research, market research, business and strategic management analyst positions establishes a precedent for the approval of the instant petition. However, the proffered position is not that of an operations research, market research, business or management analyst, but is a systems administrator. As a result, the cases cited by counsel involve occupations that are not the subject of this proceeding. Further, although counsel contends that CIS is bound by its decisions in previous cases, there is no requirement that CIS 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). Each petition

filing is a separate proceeding with a separate record and CIS is limited to the information contained in that record in reaching its decision. 8 C.F.R. §§ 103.2(b)(16)(ii) and 103.8(d).

For reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, even though it has amended its finding regarding the occupational title most closely related to the proffered position, the AAO affirms its previous decision.

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 decision of the AAO is affirmed. The petition is denied.