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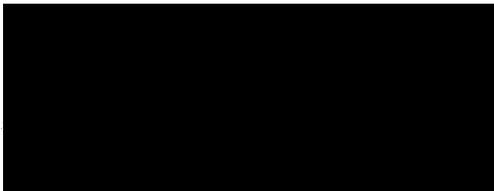
FILE: WAC 03 223 50379 Office: CALIFORNIA SERVICE CENTER Date: AUG 13 2005

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, 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 investment and management company specializing in the restaurant business with 21 employees and indicated a gross annual income of \$1.3 million. It seeks to extend the status of the beneficiary as a market research analyst. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was 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; and (4) Form I-290B, with counsel's brief. 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 (5<sup>th</sup> 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 a marketing research analyst. Evidence of the beneficiary's duties includes: the Form I-129; a July 16, 2003 letter of support from the petitioner; and petitioner's March 1, 2004 response to the director's request for evidence, which included a similar description of the work done by the beneficiary.

At the time of filing, the petitioner stated that the beneficiary would continue to: use market research to research market conditions in regional and national areas to determine potential sales of Japanese restaurant service (10% of time); use marketing strategy and consumer buying behavior to establish Japanese restaurant research methods' format for data gathering, such as consumer dining surveys and questionnaires (20% of time); use knowledge of benefit-cost analysis, accounting, marketing, and financial theory to forecast future marketing trends (20% of time); gather data on local and national Japanese restaurant competitors and analyze costs, sales, and methods of marketing (20% of time); collect data on customer preferences and dining habits (10% of time); and prepare reports and graphic illustrations of findings (20% of time).

The director requested additional information about the proffered position, specifically, establishing that researching Japanese restaurant market will provide the beneficiary sufficient work for the period of time requested. Alternatively, the director requested the petitioner to provide a list of additional duties to be performed by the beneficiary during the period of time requested.

In response to the director's request for evidence, the petitioner added the above listed percentage of time breakdown to the duties. Additionally, the petitioner stated "the Marketing Research Analyst would heavily require strong knowledge to understand and apply this state of technologies to the actual management, in order to meet the creative requirement of our clients."

In his denial, the director noted that the duties of the position appear to reflect many of those performed by market research analysts as listed under market and survey researchers in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*.) The director indicated that sole reliance on a list of duties

taken from the *Handbook* or any other publication to establish that the proffered position qualifies as a specialty occupation, is misplaced.

Due to the size and nature of the petitioner's business and nature of the duties of a marketing research analyst, the director had concerns whether the beneficiary would be able to continue to perform the services of a market research analyst. Though the petitioner was requested to provide evidence that the beneficiary would be provided sufficient work in the specialty occupation, the petitioner failed to include any evidence that the beneficiary was in the past, or would be in the future be performing the duties as listed in the petition. The director found that the petitioner failed to establish that the proffered position was a specialty occupation.

The AAO shares the director's concerns regarding the employment that has been described by the petitioner.

The *Handbook*, at page 173, states the following with regard to the employment of marketing 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. Market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussion, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate them 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. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways . . . .

Because of the applicability of market research to many industries, market research analysts are employed in most industries....

The occupation of a market research analyst is a specialty occupation, normally requiring those seeking entry-level employment to have a master's degree in a related field. However, while the petitioner has identified its position as that of a market research analyst, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention.

At the time of filing, the petitioner offered a generic description of the beneficiary's market research duties, one that appeared to describe the occupation of market research analyst rather than the proffered position. The director found this description insufficient to establish the position as a specialty occupation and asked for further information. In response, the petitioner provided a percentage breakdown of the job duties. Its only references to the beneficiary's role within the petitioner's business were phrased in general terms, e.g.,

“use market research to research market conditions in regional and national area to determine potential sales of Japanese restaurant service (10% of time); use marketing strategy and consumer buying behavior to establish Japanese restaurant research methods format for data gathering, such as consumer dining surveys and questionnaires.” The information provided by the petitioner does not explain the duties of the position in the context of the petitioner’s ongoing business.

On appeal, counsel notes that CIS previously approved an H-1B petition for this beneficiary for the same position as the one in the instant petition. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO 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). It would be absurd to suggest that CIS or any 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).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *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).

On appeal, counsel contends that market research analysts are specialty occupations. Counsel notes that “based upon the prevailing industry-wide requirement, market research analyst implemented a company policy regarding the degree requirement for professional occupations.” Counsel restates some of the proffered position’s job duties.

A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst establishes research methodologies or performs market analyses. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

The petitioner has offered no description of the duties of its proffered position beyond the generalized description it provided in response to the director’s request for evidence. It cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). While counsel has contended that “using marketing strategy and consumer buying behavior to establish Japanese restaurant research methods format for data gathering” are job duties inherent to a professional occupation, the petitioner has not provided examples of the marketing strategies the beneficiary has already produced for the petitioner. The petitioner’s generalized statements about the duties to be performed cannot substitute for a description of the specific duties to be performed by the beneficiary. As previously noted, CIS must examine the actual employment of an alien, i.e., the specific tasks to be

performed by that alien, to determine whether a position qualifies as a specialty occupation. The petitioner has not provided information about the number of customers it serves or the types of information the market research analyst will analyze. Additionally, the petitioner has not adequately described its business in order for the AAO to understand how the market research analyst will fulfill its duties. The record does not indicate if the petitioner owns a restaurant, manages a restaurant, or acts as a consultant to restaurants. The petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, whether the position is that of a market research analyst. Further, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the 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. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services.

Therefore, for the reasons related in the preceding discussion, 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.