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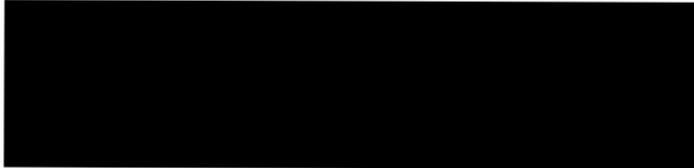
FILE: WAC 04 255 50937 Office: CALIFORNIA SERVICE CENTER Date: **MAY 24 2006**

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The director of the California 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 a seafood wholesaler and distributor that seeks to employ the beneficiary as a market research analyst and to classify her 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 on the basis that the petitioner failed to establish that its proposed position was a specialty occupation. On appeal, the petitioner submits a brief and additional documents.

The issue before the AAO is whether the proposed 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.

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 bachelor’s or higher degree, but one in a specific specialty that is directly related to the proposed position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) counsel’s response to the RFE; (3) the director’s denial letter; and (4) Form I-290B, with the petitioner’s brief and supporting documentation. The AAO reviewed the record in its entirety before reaching its decision.

The petitioner seeks the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; a July 22, 2003 letter of support from the petitioner; and counsel’s May 5,

2004 response to the RFE. At the time of filing, the petitioner stated that the beneficiary's duties would entail profiling current and potential customers; finding out the way customers make their buying decisions and formulating methods and procedures to determine client/customer preferences on products and services; getting feedback from customers about products or services needed that are not currently readily available; evaluating the seafood market size, current market trends, sales coverage, growth characteristics, buying tendency, penetration, and inclination for the future; researching global market conditions or changes in the industry that may affect sales; working with sales groups to compile transaction and demographic data; making appropriate recommendations; profiling existing and potential competitors to determine their strengths, weaknesses, selling proposition, product price, quality and assortment, location, distribution, marketing methods, and strategies; identifying existing opportunities; tracking ongoing pertinent information with reports and graphs; staying informed on product developments, competitive tactical and strategic activities, and providing marketing research findings where appropriate; assisting in the preparation, presentation, and follow-up of research proposals; supporting ad hoc marketing research needs/consultation on questions/issues not normally falling under the scope of traditional product-oriented marketing research analysis; establishing research methods and designing formats for data gathering and analysis of potential opportunities in the Latin American market; identifying wholesaler product suppliers; type of seafood products available, price, quality, distribution policy, and other relevant information; and evaluating the efficacy of promotional materials and strategies in existence or to be created with product and sales teams. The petitioner stated the minimum education, training and experience necessary to the job is a bachelor's in marketing, business administration, marketing research, economics or the equivalent.

In his denial, the director questioned whether the petitioner has the organizational complexity to support a position for a market research analyst and noted that most organizations would have little need for a permanent full-time or even a part-time position as a market research analyst. The director referred to the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) which indicates "...companies find it more profitable to contract for marketing research services rather than support its own marketing department." The director found that the petitioner does not engage in the type of business for which a marketing research analyst would be required on a full-time or part-time basis. Further, the director found that most of the duties were those of a marketing manager and that marketing managers were not specialty occupations.

On appeal, the petitioner asserts that various types of companies use the services of market research analysts. The petitioner asserts that the director contradicted himself by agreeing, first, that the proposed position was that of a market research analyst, and then, that it was that of a marketing manager. The petitioner refers to several job postings for market research analysts.

The petitioner need only satisfy one of the criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) to establish that a position is a specialty occupation. Upon a thorough review of the record, the AAO concludes that the petitioner has not established that the proposed position meets any of the criteria outlined in 8 C.F.R. §214.2(h)(4)(iii)(A). Therefore, the proposed position is not a specialty occupation.

The AAO does not agree with the director's conclusions regarding the industries in need of market research analysts. Based on the discussion of the occupation in the 2006-'07 edition of the *Handbook*, it concludes that such analysts may reasonably be found in virtually every industry and business seeking to enhance the sales of its products and/or services. However, the AAO does share the director's concerns regarding the employment that has been described by the petitioner.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title, but reviews the specific duties of the proposed position, combined with the nature of the

**petitioning entity's business operations.** 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 bachelor's or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties of particular occupations. Based on the petitioner's description and a thorough review of the *Handbook*, the AAO finds that the proposed position can be more precisely categorized as a marketing manager, rather than a market research analyst. The proposed position is not a market research analyst because market research analysts, or marketing surveyors, design and develop surveys to assess consumer preference. They direct trained interviewers who conduct the actual surveys, then analyze the survey results for their clients. None of the proposed duties involves the creation and oversight of market surveys.

The duties described for the proposed position more closely resemble the duties of marketing managers, who, according to the *Handbook*, identify potential markets and work with advertising and promotion managers to promote the firm's products and services and to attract potential users. Marketing managers develop 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. With the help of subordinates, they also identify potential markets and determine the demand for products and services offered by the firm and its competitors. These duties are similar to such duties of the proposed position as "evaluating the seafood market size, current market trends, sales coverage, growth characteristics, buying tendency, penetration, and inclination for the future" and "profiling existing and potential competitors to determine their strengths, weaknesses, selling proposition, product price, quality and assortment, location, distribution, marketing methods, and strategies."

To determine if the proposed position qualifies as a specialty occupation under the criterion at 8 C.F.R. 214.2(h)(4)(iii)(A)(I) – a bachelor's or higher degree or its equivalent, in a specific field of study is normally the minimum requirement for entry into the particular position – the AAO turns to the *Handbook's* discussion of the educational requirements for marketing managers. Regarding the educational requirements for those in this field, the *Handbook* notes that:

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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous.

The *Handbook* clearly indicates that jobs in this field do not require a specific bachelor's degree for entry into the field. Employers consider those with liberal arts degrees and relevant work experience suitable for jobs in this area. Employers prefer, but do not require, marketing managers to possess bachelor's degrees in specific fields of study. As no specific course of study is required for these occupations, the petitioner fails to

establish that a bachelor's or higher degree in a specific field of study is the normal minimum requirement for entry into the proposed marketing manager position.

The AAO turns next to the first alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - a specific degree requirement is common to the industry in parallel positions among similar organizations. To determine if a position is a specialty occupation under this criterion, CIS generally considers whether or not letters or affidavits from companies or individuals in the industry attest that such companies "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)). The job postings the petitioner submits to support this criterion have no probative value. The announcements either do not describe the duties with sufficient particularity to determine if they are similar to the proposed position, or are from companies dissimilar to the petitioner, a seafood wholesaler with 17 employees. Thus, the petitioner has failed to establish that a specific degree requirement is common to the seafood wholesale industry in parallel positions among similar companies.

The AAO now turns to the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – the employer normally requires at least a bachelor's degree or its equivalent, in a specific field of study, for the position. To determine if a petitioner has established this criterion, the AAO generally reviews the petitioner's past employment practices, including the histories of those employees who previously held the position, as well as their names, dates of employment, and copies of their diplomas. In the instant case, the petitioner has not submitted evidence to establish its normal hiring practices for the proposed position. In the absence of an employment history for the position, the petitioner has not established that its position qualifies as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criteria related to the complexity, uniqueness, or specialized nature of the proposed position. The second alternative prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) is satisfied by establishing that a particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree in a specific field of study. The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires a petitioner to 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 bachelor's or higher degree in a specific field of study. The petitioner asserts, without substantiating evidence, that the proposed position involves such highly demanding responsibilities that it requires a person with a bachelor's degree in a business-related field, and that the nature of the position is so complex that the knowledge required to perform it is associated with the attainment of a bachelor's degree in a business-related field. To the extent that they are depicted in the record, the duties of the proposed position are routine for marketing managers, which the *Handbook* indicates may be performed by persons without bachelor's degrees in related fields. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The petitioner has failed to establish the referenced criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) or (4).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proposed position is a specialty occupation.

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.

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**ORDER:** The appeal is dismissed. The petition is denied.