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FILE: WAC 05 147 51509 Office: CALIFORNIA SERVICE CENTER Date: JAN 29 2007

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 an auto parts supplier that seeks to continue the beneficiary's employment as a market research analyst 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 determined that the petitioner submitted contradictory wage evidence and had failed to establish that the beneficiary would be paid the prevailing wage for the proffered position as required by the terms of the Labor Condition Application (LCA) and by 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). The director determined further that the record lacked corroborative evidence to establish that the beneficiary would be employed in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Act. The petition was denied accordingly.

Counsel asserts on appeal that U.S. Citizenship and Immigration Services (CIS) guidelines require CIS to defer to its previous H-1B status determination absent a material change in the underlying facts of the present case. Counsel acknowledges that the petitioner may have violated labor regulations in the present matter, counsel asserts, however, that CIS has no jurisdiction to make a determination relating to labor regulation violations. Counsel asserts that, for immigration purposes, no material change in facts exists in the present matter, and counsel concludes that the record establishes the proffered position is a specialty occupation.

The AAO agrees that issues relating to the violation of LCA conditions, misrepresentation of material facts on an LCA, and appropriate penalties are matters for U.S. Department of Labor adjudication, pursuant to the complaint, investigation, and disposition provisions of section 212(n) of the Act, 8 U.S.C. § 1182(n). Nevertheless, the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), provides that with the filing of an H-1B petition, a petitioner must submit a statement to CIS that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for Nonimmigrant Worker (Form I-129); (2) the director's request for additional evidence (RFE); (3) counsel's response to the director's request and supporting documentation; (4) the director's denial letter; and (5) Form I-290B, Notice of Appeal to the AAO, with counsel's brief. The AAO reviewed the record in its entirety before issuing its decision.

The present record contains contradictory and unexplained wage evidence for the beneficiary. The LCA filed by the petitioner states the prevailing wage for the proffered position is \$31,782 a year, and that the beneficiary will be paid \$36,000 a year. As noted in the director's decision, however, the record contains Form W2 and Form W-2c, federal wage and tax evidence reflecting that the petitioner's 2004 Form W2 indicated that the beneficiary earned \$21,000. The petitioner indicated in its 2004 Form W-2c, Corrected Wage and Tax statement, however, that it was correcting previously reported wage information stating that the beneficiary earned \$18,000 a year. The 2004 Form W-2c reflects further that the beneficiary's corrected earnings for the year were \$15,000.

Concerns regarding the inconsistencies in the petitioner's federal tax evidence, and regarding the petitioner's failure to establish that it paid the beneficiary the prevailing wage for the proffered position, were raised in the director's RFE. No explanation was provided in response to the RFE. On appeal, counsel states that the

petitioner may have violated labor regulations in the present matter, but that CIS has no jurisdiction to make a determination relating to labor regulation violations. Neither the petitioner, nor counsel provide any other explanation or statements regarding the inconsistent federal wage and tax evidence relating to the beneficiary's rate of pay.

The AAO finds that the wage evidence contained in the record contains material discrepancies and presents serious questions as to the validity of the evidence. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In the present matter, no objective or explanatory evidence has been presented. Accordingly, the AAO finds that the petitioner has failed to establish that it has paid the beneficiary the prevailing wage for the proffered position.

Doubt cast on any aspect of the petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, supra*. The AAO finds the petitioner's statement that it will comply with the terms of the LCA for the duration of the alien's period of authorized stay to be unreliable, in light of the petitioner's inability to explain its previous failure to pay the prevailing wage to the beneficiary. The petitioner has therefore failed to comply with the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(B)(2).

Furthermore, the AAO finds that the petitioner has failed to establish that it will employ the beneficiary to perform services in a specialty occupation, as set forth in section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b). 8 C.F.R. § 214.2(h)(1)(ii)(B).

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 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.

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.

In order 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.

Counsel asserts that the proffered position is a specialty occupation. Counsel asserts further that the petitioner’s previous, and similar Form I-129 petition was approved by CIS on the beneficiary’s behalf, and that the present position therefore also qualifies as a specialty occupation.

To determine whether the employment described qualifies as a specialty occupation, the AAO turns first to 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 U.S. Department of Labor’s Occupational Outlook Handbook (*Handbook*), on which the AAO routinely relies for the educational requirements of particular occupations, 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.” *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 petitioner has stated that the proffered position is that of a market research analyst. The *Handbook* (2006-2007 Edition) indicates on pages 175-176, that market research analysts may reasonably be found in virtually every industry and business seeking to enhance the sales of its products and/or services.

Specifically, the *Handbook* 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. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future markets. Market research analysts devise methods and procedures for obtaining the data they need. Often they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussion, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.

After compiling the data, market research analysts make recommendations to their client or employer on the basis of 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 . . . .

The *Handbook* reflects on page 176, that, "a bachelor's degree is the minimum educational requirement for many market . . . research jobs."

The AAO finds that, although the petitioner has identified its position as that of a market research analyst, the petitioner's description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention that the beneficiary will be employed as a marketing research analyst.

The regulation at 8 C.F.R. § 214.2(h)(9)(i) allows the director to request "such other evidence as he or she may independently require to assist his or her adjudication." In the present matter, CIS must adjudicate whether the duties of the proffered position require a four-year degree in a specialty by analyzing those duties in the context of the petitioner's business operations. The requested evidence regarding the beneficiary's previous job duties and performance would corroborate the petitioner's statements on the Form I-129, and on appeal.

It is noted that the Form I-129 does not contain a description of the proffered position job duties. It is noted further that the RFE sent by the director to the petitioner, requested a description of the proffered position duties and of the beneficiary's present position duties. As previously discussed, the evidence in the record fails to support the contention that the petitioner has paid the beneficiary the prevailing wage for a market research analyst position. Furthermore, no description or discussion of the proffered position duties was provided in the petitioner's response to the RFE, and no information was provided on appeal. The record contains two (1 page) Order Reports, and two (1 page) Sales Expectation and Projection Reports prepared by the beneficiary. The petitioner provided no context information or explanation regarding the reports or how they were arrived at, and the reports fail to establish the duties of the proffered position, or the beneficiary's previous work as a market research analyst.

Going on record without supporting documentation is not sufficient to meet 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)). Furthermore, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The AAO finds that the record lacks evidence to support the contention that the beneficiary has performed the duties of a market research analyst for the petitioner, or that it would employ the beneficiary as a market research analyst. The petitioner has therefore failed to establish that the proffered position is a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – which requires a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To establish the proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(A), the petitioner must prove that a specific 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.

The record contains no evidence on parallel positions in similar organizations. Nor does the record contain a description or discussion of the proffered position duties. Accordingly, the record does not establish the proffered position as a specialty occupation based on an industry-wide degree requirement in similar organizations, or based on its complex and unique nature.

To determine whether a proffered position may be established as a specialty occupation under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) – which states that the employer normally requires a degree or its equivalent for the position – the AAO reviews the petitioner's past employment practices, as well as the histories of those employees with degrees who previously held the position. The record contains no evidence to establish that any employee other than the beneficiary worked for the petitioner in the proffered position.

Counsel indicates that the proffered position is a specialty occupation because CIS previously approved a similar petition for the petitioner on the beneficiary's behalf. However, the present record of proceeding does not contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted in the present matter are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Furthermore, 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 case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior Form I-129 petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been materially erroneous. 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).

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires the petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. As previously discussed, the record does not contain a description or discussion of the proffered position duties. Accordingly, the petitioner has failed to establish the proffered position as a specialty occupation based on its specialized and complex nature.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner in the present matter has not sustained that burden. The appeal will therefore be dismissed.

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