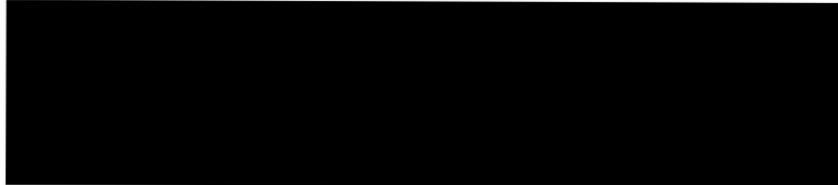


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FILE: WAC 06 266 54551 Office: CALIFORNIA SERVICE CENTER Date: **JAN 31 2008**

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 engaged in the import, conversion and distribution of functional fabrics and seeks to employ the beneficiary 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 denied the petition because he determined the position was not a specialty occupation.

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

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 seeks the beneficiary’s services as a market research analyst. In the petitioner’s support letter, dated August 17, 2006, the duties of the proffered position are described as follows:

1. Examine and Analyze statistical data to forecast market trends and identify potential markets for wholesale of fabrics in the U.S., Canada, Asia, Central and South America, Europe and other emerging markets and suppliers of quality fabrics; advise management on sales projections (20%)
2. Research data on competitors in U.S. and other markets and analyze their methods of promotion and marketing, prices and other relevant data; research data of law and regulations, domestic and international events that may affect supply of fabrics and garments industry in general (20%)
3. Devise methodology for research and determine formula and models for analysis (10%)
4. Collect data on client preferences and fashion forecast in the U.S., Asia and Europe. Prepare questionnaires for client survey and interview to assess customer preferences (20%)
5. Organize and analyze findings of surveys and research and make recommendations to management on areas such as ads, promotions and market positioning; recommend

strategies for marketing and review effectiveness of marketing campaign and recommend changes when necessary (20%)

6. Set-up tracking system to determine effectiveness of marketing and promotion including client feedback and suggestion system (10%)

On November 30, 2006, the director requested additional information, including a more detailed job description of the work to be performed by the beneficiary and an explanation as to why the work to be performed requires the services of a person who has a college degree or its equivalent in the occupational field. The director also requested an organizational chart of the U.S. company.

In response, the petitioner included the same job description as previously submitted with the initial filing. In the response letter, dated February 20, 2007, counsel for the petitioner asserted that the “duties clearly required theoretical and practical application of specialized knowledge in marketing, business administration and research and therefore require the holder of the position to have attained a bachelor’s or higher degree in those specialties.” The petitioner did not submit a more detailed description of the job duties as requested, and failed to submit an organizational chart of the U.S. company. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In response to the director’s request for evidence, the petitioner submitted copies of the Form DE-6, Quarterly Wage Report, for the third and fourth quarters of 2006. The quarterly wage reports indicated that the company hired 13 employees for the majority of the third and fourth quarters of 2006. On the Form I-129, the petitioner indicated that it employs 10 individuals. On appeal, the petitioner submitted an organizational chart indicating a total of 22 employees. The petition states three different numbers for the petitioner’s current employees. It is unclear how many individuals are employed by the petitioner and whether the U.S. company does in fact employ a marketing manager, three sales heads and a product sample coordinator as indicated on the organizational chart submitted on appeal. 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).

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. The director stated that the duties of the proposed position were not those of a market research analyst but were in fact actually those of a marketing manager. The director also found that the petitioner lacked the “organizational complexity to credibly offer” a full-time position as a market research analyst.<sup>1</sup> The director further noted that that the record is insufficient to classify the offered position as a market research analyst position related to the type of industry in which the beneficiary would be employed. Finally, the director found that the petitioner was not in compliance with the terms and conditions of employment as shown on the petition and the labor condition application (LCA).

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<sup>1</sup> In arriving at this conclusion the director noted the petitioner’s small size and its lack of a demonstrated sales and marketing division, department, team, or staff to implement the sales campaigns and the recommendations made by a market research analyst.

The AAO disagrees with the director's statement that the petitioner does not engage in the type of business for which a market research analyst would typically be required on a regular full-or part-time basis. In reviewing the Department of Labor's *Occupational Outlook Handbook* (hereinafter the *Handbook*), the work of marketing research analysts is concerned with the potential sales of a product or service and provide a company's management with information needed to make decisions on the promotion, distribution, design and pricing of products or services. Market research is applicable to a broad range of industries and businesses seeking to improve their market share and profits. The fact that the petitioner is a retail business engaged in the selling of food supplements does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of increasing its business opportunities and earnings. However, the petitioner's potential need to conduct market research does not establish the proffered position as a specialty occupation.

The occupation of a market research analyst may be a specialty occupation, in that some employers require those seeking entry-level employment to have the minimum of a bachelor'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. On appeal, counsel contends that the very similarity between the petitioner's description of its proffered position and the *Handbook's* discussion of the occupation of market research analyst should be a basis for approval. The AAO does not agree. 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 *Handbook* states the following with regard to the employment of marketing research analysts:

Market and survey researchers gather information about what people think. *Market*, or *marketing, research analysts* help companies understand what types of products people want and at what price. They also help companies market their products to the people most likely to buy them. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze data on past sales to predict future sales.

Market research analysts devise methods and procedures for obtaining the data they need. Often, they design surveys to assess consumer preferences through Internet, telephone, or mail responses. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction. . . .

Although the petitioner states that it is interested in expanding its target market in the US and overseas, the proposed duties do not indicate the kinds of market research methods that the business analyst will devise and implement. Nor has the petitioner offered any information corroborating its plans to expand domestically and internationally. The petitioner did not present evidence that the petitioner is working to expand its company internationally to the Central American, European and Asian markets. The AAO also notes that market research analysts are not typically employed by the companies who need their services, but rather work for market research companies who contract their services to various companies for defined periods of time. In this case, the petitioner has not submitted sufficiently detailed information regarding its business operations and plans for expansion to establish that it would in fact employ the beneficiary as a market research analyst. Simply 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)).

In the instant case, the petitioner has offered no description of the duties of its proffered position beyond the generalized outline it provided at the time of filing. 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. However, 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.

Further, the *Handbook* notes that while a bachelor's degree is generally required for a market research analyst position, it does not indicate that the degree need be in a specific field.

When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specialization, e.g., business administration, can perform the duties, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specific course of study.

Also, the AAO notes that the petitioner finds acceptable a bachelor's degree in business administration for the position. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialized occupation. See *Matter of Michael Hertz Associates*, 19 I & N Dec. 558 (Comm. 1988). Again, 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.

As noted above, the duties are too generally defined to establish the duties the beneficiary would be performing in the United States, including as to whether the duties are similar to the duties performed by a marketing manager as found by the director. Further, the *Handbook* indicates no specific degree requirement for employment as a marketing manager, and thus performance of the duties of a marketing manager does not require an individual to hold a baccalaureate or higher degree in a related field.

Accordingly, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the five job postings submitted by counsel on appeal. However, counsel has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner. The petitioner has not demonstrated that its degree requirement exists in parallel positions among similar organizations.

There is no information in the record to establish that the companies advertising their vacancies in the submitted job postings are similar in size, scope, or scale of operations, business efforts, or expenditures to the petitioner, a garment wholesaler with 10 employees. Simply 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. at 165. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaighbena*, 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 has no basis to conclude that any of the job postings submitted by counsel are from organizations that may be considered "similar" to the petitioner.

Moreover, these advertisements provide too little information regarding the duties of the positions that would allow the AAO to undertake a meaningful analysis as to whether the positions are in fact "parallel" to the position proposed here. The AAO notes that the positions require a bachelor's degree with no **particular field of study**. Again, CIS interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.<sup>2</sup> The fact that these positions share a few similar duties with the petitioner's proposed position does not mean that they are in fact parallel positions. Thus, these job postings are insufficient to establish the petitioner's degree requirement as an industry norm in parallel positions among similar organizations.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with at least a bachelor's

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<sup>2</sup> See also *Matter of Michael Hertz Associates*, 19 I & N Dec. 558 (Comm. 1988).

degree in a specific specialty. Although counsel for the petitioner asserts that the petitioner requires an employee with a bachelor's degree to fill the position of market research analyst since the proposed job duties are "highly complex and specialized," the petitioner did not submit any documentation corroborating this statement. 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 unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet this 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. However, no such evidence has been submitted by the petitioner to demonstrate that the proposed position qualifies under this criterion.

While the petitioner states that a degree is required, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations in any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388. Based on the foregoing discussion, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration 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.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Again, there is no information in the record to support a finding that the proposed position is more complex or unique than similar positions in other, similar organizations. 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. However, 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, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. The position in this petition is not a specialty occupation, so the beneficiary's qualifications to perform the duties of a specialty occupation are inconsequential. Accordingly, the AAO will not disturb the director's denial of the petition.

The second issue to be addressed is whether the petitioner will comply with the terms of the Labor Condition Application (LCA) for the duration of the alien's stay. The director noted in his decision that the petitioner seeks to secure the beneficiary's service for a full-time market research analyst with an annual salary of \$33,904. The director also noted that the beneficiary was previously employed by a company owned by the petitioner in H-1B status with a proffered salary of \$31,200; however, the Form W-2 submitted on behalf of the beneficiary indicated that the beneficiary earned less than the prevailing wage.

On appeal, counsel for the petitioner explains that in 2005 and 2006, "the beneficiary requested to reduce working hours due to time-offs and sickness." The petitioner also submitted a letter written by the beneficiary explaining that the decreased salary was due to illness and time off. According to the beneficiary's letter, it appears that she was working part-time rather than full-time.

Under 8 C.F.R. § 214.2(h)(4)(iii)(B)(2), the petitioner is required to "submit a statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay." The petitioner did not submit an amended H-1B petition on behalf of the beneficiary to reflect that the position changed from a full-time position to a part-time position, and did not pay the beneficiary the wages stated in the previous LCA. It is incumbent upon the petitioner to establish that it will comply with the terms of the LCA for the duration of the beneficiary's authorized stay. As the petitioner has not established through objective evidence that it previously complied with the LCA, its statement that it will comply with the terms of the LCA cannot be believed. 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). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Thus, the petitioner has not complied with 8 C.F.R. § 214.2(h)(4)(iii)(B)(2). For this additional reason, the petition will be denied.

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.