U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

D2

[redacted]

FILE: WAC 04 044 52958 Office: CALIFORNIA SERVICE CENTER Date: JUN 28 2006

IN RE: Petitioner:
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:

[redacted]

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 service center director 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 corporation engaged in the importation and wholesale of general merchandise to retail/wholesale companies in the United States. In order to continue to employ the beneficiary in a position designated as market research analyst, the petitioner endeavors to continue the beneficiary's classification as an H-1B temporary 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 had failed to establish that the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the proposed duties as described by the petitioner "appear to reflect many of those performed by Market Research Analysts as listed under Market and Survey Researchers in the [2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook* (*Handbook*)]." However, the director determined that the evidence of record established that the duties more closely resemble those of a marketing manager than a market research analyst.

On appeal, counsel contends that the director's decision was erroneous, as the evidence of record establishes that the proffered position is "still that of a Marketing Research Analyst, a specialty occupation normally requiring a minimum of a bachelor's degree or equivalent in economics or [a] related field."

As will be discussed below, the AAO finds that the petitioner has not established that the proffered position is a specialty occupation. Accordingly, the director's decision to deny the petition shall not be disturbed.

The AAO bases its decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; (5) the Form I-290B, counsel's October 18, 2004 brief on appeal, and the documents submitted with the brief.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184 (i)(l), 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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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." (Italics added.)

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 has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

The AAO finds that the record lacks sufficient evidence about the beneficiary's duties to establish that the proffered position meets the statutory and regulatory standards outlined above. Under those standards, specialty occupation status is determined by what the evidence of record conveys about the level of knowledge in a specific specialty that the beneficiary must theoretically and practically apply to perform the particular job that is the subject of the H-1B petition under review. Therefore, to determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. Nor does CIS rely on generalized descriptions of duties that do not relate actual performance that is indicative of the theoretical and practical application of at least bachelor's degree level of knowledge in a particular specialty. CIS must focus on the actual employment of the alien. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position, an employer's standards that are self-imposed rather than dictated by actual performance requirements of the position, or the extent to which the record's

duty descriptions mirror those that the *Handbook* uses for an occupational category. Rather, the decisive issue is whether the evidence of record establishes that, as required by the Act, the particular position that is the subject of the petition actually requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty, and the attainment of a baccalaureate or higher degree in that specialty.

As reflected in the following excerpts from the record, the petitioner's evidence about the proffered position lacks concrete details. Consequently, the record lacks a factual basis for the AAO to determine the level of specialty knowledge that the execution of the beneficiary's duties entail. Therefore, the petitioner has not satisfied any specialty occupation criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner's November 24, 2003 letter of support that was filed with the Form I-129 (Petition for Nonimmigrant Worker) states, in part:

> [The petitioner] was established in March of 1981 and is engaged in [the] import/export and sale of general merchandise. For the twelve-month period ending on March 31, 2003, the company has recorded a gross sale of over $5.4 million. Due to our continual growth, we are in need of a Market Research Analyst.
>
> [The beneficiary] will utilize his education and experience as Market Research Analyst to research market conditions in local to national area[s] to determine [the] potential sale of the company's products. He will examine and analyze statistical data to forecast future marketing trends. He will also gather data on competitors and analyze prices, sales and methods of marketing and distribution. Finally he will prepare reports on findings.

In his July 19, 2004 letter of reply to the RFE, counsel provided the following account of what the beneficiary has been doing in the market research analyst position:

> Job Description: The company is involved in [the] import and wholesale of general merchandises [sic] to retail/wholesale companies in the U.S. For the recent fiscal year, the company has recorded a gross sale of over $5 million. The Beneficiary, as a Market Research Analyst for the company, is responsible for providing information to further promote and sell [the] company's products in the U.S.. He collects and analyzes data on customer demographics, preferences, needs and buying habits to identify potential markets. He develops and implements procedures for identifying advertising needs. He gathers data on competitors and analyzes their prices, sales and methods of marketing. He measures and assesses customer satisfaction. Finally, he prepares periodic reports on findings.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations, and, accordingly, considered the evidence of record in the light of the 2006-2007 Internet edition of the *Handbook*,[1] as well as the 2004-2005 edition, which counsel references.

As a preliminary matter, the AAO notes that, while the 2004-2005 *Handbook* indicated that employers of market research analysts required at least a bachelor's degree (and most often a master's degree) in marketing or a related field, the 2006-2007 edition of the *Handbook* indicates that a bachelor's degree without a specific major or concentration is generally sufficient for entry-level marketing research analyst positions. As the 2006-2007 *Handbook* indicates that employers of entry-level market research analysts do not normally require at least a bachelor's degree, or its equivalent, in a specific specialty, the *Handbook* no longer supports market research analyst positions as qualifying under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). However, for the reasons discussed below, the proffered position would not qualify under this criterion even if considered in light of the 2004-2005 *Handbook*.

As reflected in the above excerpts from the record, the petitioner has limited its description of the position and its duties to exclusively generic terms that relate only abstract, general functions, such as: "examin[ing] and analyz[ing] statistical data"; "forecast[ing] future marketing trends"; "collect[ing] and analy[zing] data on customer demographics, needs, and buying habits"; "measure[ing] and "assess[ing] customer satisfaction"; and "prepar[ing] periodic reports for findings." The record contains no examples of the work that has been performed in the position, and no exposition of actual work that would be performed under the abstract functions listed as the beneficiary's duties. The record contains no substantive information about on-the-job performance required to execute the referenced generalized functions. The record's descriptions do not illustrate any theoretical and practical applications of highly specialized marketing-analysis knowledge that would be involved.

As limited as it is to generalities about the proffered position, the evidence of record does not establish that the position is one that normally requires at least a bachelor's degree, or the equivalent, in a specific field. Therefore, the petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the director was correct in determining that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The first alternative prong assigns specialty occupation status to a proffered position whose requirement for at least a bachelor's degree in a specific specialty is commonly imposed by employers, in the petitioner's industry and similar to the petitioner, when hiring for positions parallel to one proffered by the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS include: whether the *Handbook* 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*,

[1] The 2006-2007 *Handbook* is accessible on the internet at *www.stats.bls.gov/oco*.

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)).

As discussed above, the petitioner has not established that its proffered position is any type for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, the record before the director did not include any submissions from a professional association or from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in a specific specialty.

The petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*), which provides that "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." As reflected in the earlier discussion regarding the evidence, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than positions that can be performed by persons without a specialty degree or its equivalent.

As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in the earlier discussion of the limited evidence about the proffered duties, the petitioner has provided no specific information about what actual on-the-job performance entails. Consequently, the record fails to establish specific duties so specialized and complex that their performance requires knowledge usually associated with at least a bachelor's degree in a specific specialty.

The decision under appeal does not indicate whether the director reviewed the prior approval of the nonimmigrant petition that provided the beneficiary the H-1B classification that has enabled him to work in the position which is now the subject of this extension petition. However, each petition filing 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 the proceeding being appealed. *See* 8 C.F.R. § 103.2(b)(16)(ii). If the previous nonimmigrant petition had been approved based on the same evidence contained in the current record, the approval would constitute material and gross error on the part of the director. Prior approvals do not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). 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).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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.