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FILE: WAC 05 018 52298 Office: CALIFORNIA SERVICE CENTER Date: NOV 29 2006

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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a commercial and sport fishing business. It seeks to employ the beneficiary as a navigator and to continue his classification 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 grounds that the record failed to establish that the proffered position qualifies as a specialty occupation or that the beneficiary is qualified to perform services in a specialty occupation.

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.

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 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.

The record of proceeding before the AAO contains (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B and an appeal brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner describes itself as a commercial/sport fishing operation, established in 1998, with five employees and a gross annual income of \$210,000. The petitioner initially hired the beneficiary as an H-1B

worker in November 2000 to work as a navigator onboard the company's vessels. In the Form I-129 the petitioner also refers to the position as "officer aboard vessel." The instant petition seeks to extend the beneficiary's H-1B classification for another three years at a pay rate of approximately \$20,000/year. The duties of the position are described by counsel, in a letter submitted with the original petition for H-1B status, as follows:

[The beneficiary] will be responsible for operating and maintaining advanced navigation and electronic equipment aboard the vessels such as loran systems, radar and depth sounders which indicate water depth and existence of marine life [D]uties include overseeing the various systems that propel and operate the ship. They include propulsion, steering, anchoring and ship securing, cargo handling, air conditioning, power generation and distribution . . . [and] maintenance of the communication equipment.

[T]he position requires supervision of the chief engineer, deckhands, and the maintenance crew.

Counsel states in a letter submitted with the original petition that "[t]here is no educational institution that teaches skills necessary to become a professional crewman aboard commercial/sport fishing vessels," and that the qualifications required for such jobs are learned by means of on-the-job work experience. The record includes a letter from the beneficiary's prior employer in Mexico, a commercial fishing operation, stating that the beneficiary worked for the company as a navigator for 22 years, from 1978 to 2000, and was trained entirely on the job.

In his decision the director referred to the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* and found that the duties of the proffered position reflected those of a deck officer or mate, which are subcategories of two distinct occupational categories described in the *Handbook* – "water transportation occupations" and "fishers and fishing vessel operators." The director quoted language from the *Handbook* indicating that a baccalaureate level of training is not the normal minimum requirement for entry into those occupations. The director also determined that the evidence of record failed to establish that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations, that the proffered position is so complex or unique that it can only be performed by an individual with a degree, that the petitioner normally requires a degree for the position, or that the job duties and their level of responsibility are beyond those normally encountered in the occupational field. The director concluded that the proffered position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). In addition, the director determined that the record fails to establish that the beneficiary is qualified to perform services in a specialty occupation in accordance with the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4) and 8 C.F.R. § 214.2(h)(4)(iii)(D).

On appeal counsel points out that the beneficiary has already been approved for H-1B status in the past and that the instant extension petition is based on the same evidence submitted with the initial petition in 2000. Considering the instant petition involves the same facts, parties, and evidence as the earlier approved petitions (in 2000 and 2002), counsel asserts that the earlier decision(s) should be given full faith and credit and the instant petition should be approved.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

In accord with the director's decision, the AAO determines that the proffered position falls under the *Handbook's* occupational category of fishers and fishing vessel operators. See *Handbook*, 2006-07 edition, at 487-90.¹ With regard to the educational requirements of the occupation, the *Handbook* states, in pertinent part, as follows:

Fishers usually acquire their occupational skills on the job No formal academic requirements exist. Operators of large commercial fishing vessels are required to complete a Coast Guard-approved training course. Students can expedite their entrance into these occupations by enrolling in 2-year vocational-technical programs offered by secondary schools. In addition, some community colleges and universities offer fishery technology and related programs that include courses in seamanship, vessel operations, marine safety, navigation, vessel repair and maintenance, health emergencies, and fishing gear technology. Courses include hands-on experience. Secondary and postsecondary programs are normally offered in or near coastal areas.

Experienced fishers may find short-term workshops offered through various postsecondary institutions especially useful. These programs provide a good working knowledge of electronic equipment used in navigation and communication and offer the latest improvements in fishing gear.

Id. at 488-89. As the *Handbook* clearly indicates, a baccalaureate degree or its equivalent in a specific academic specialty is not the normal minimum requirement for entry into a position as navigator on a fishing vessel. Though postsecondary programs including courses on navigation are available in community colleges and universities, they do not appear to be at a baccalaureate level and are not required for entry into the occupation. Based on the information in the *Handbook* the AAO determines that the proffered position does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

¹ The other occupational category identified in the director's decision – water transportation occupations – involves the movement of passengers and cargo on waterborne vessels such as merchant ships, tugboats, towboats, ferries, dredges, and excursion vessels (see *Handbook*, 2006-07 edition, at 647). Thus, it does not directly apply to the petitioner's business and type of vessel. The *Handbook* expressly states that "[w]orkers who operate watercraft used in commercial fishing are described in the section on fishers and fishing vessel operators elsewhere in the *Handbook*." *Id.*

With respect to the second alternative criterion of a specialty occupation, the record does not establish that a degree requirement is common to the petitioner's industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The record includes a letter from the beneficiary's previous employer in Mexico, a commercial fishing business like the petitioner, stating that there are no educational institutions that teach the skills needed for the proffered position and that navigators acquire their expertise by means of on-the-job training. Nor does the record demonstrate that the proffered position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The position is not unique, and the evidence does not show that it is more specialized than other navigator positions on fishing vessels, which the *Handbook* indicates is an occupation that does not require a baccalaureate degree in a specific specialty.

With regard to the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), counsel acknowledges that there is no applicable baccalaureate degree for the proffered position and that on-the-job experience is the best qualification for the job. The petitioner's only previous hire for the position – the beneficiary – does not have a baccalaureate degree. Accordingly, the petitioner cannot demonstrate that it normally requires its navigator to have a bachelor's degree or the equivalent, as required for the position to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Lastly, the proffered position does not meet the fourth alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), because the record does not establish that the duties are so specialized and complex that they require a depth of knowledge usually associated with the attainment of a baccalaureate degree in a specific specialty. The duties of the position are those of a fishing vessel navigator, an occupation which the *Handbook* indicates does not require baccalaureate level knowledge in a specific specialty. Based on the evidence of record, the AAO concludes that the proffered position can be performed by an individual with less than baccalaureate level knowledge in a specific specialty.

Notwithstanding the service center's previous approval of H-1B status, the current petition to continue the beneficiary's H-1B classification cannot be approved unless the record establishes current eligibility. CIS is not required to approve a petition when eligibility has not been demonstrated merely because of a prior approval that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Moreover, the AAO is never bound by a decision issued by a service center or a district director. *See 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). 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 petitioner's record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

For the reasons discussed above, the evidence of record does not establish that the proffered position qualifies as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

As previously mentioned, the director also found that the record failed to establish that the beneficiary is qualified to perform services in a specialty occupation. Since the issue of the beneficiary's qualifications is

relevant only if the proffered position is a specialty occupation – which is not the case here – the AAO will not further address this issue in adjudicating the appeal.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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