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FILE: WAC 05 124 52095 Office: CALIFORNIA SERVICE CENTER Date: DEC 04 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:
[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 clinical laboratory. In order to employ the beneficiary in a position that it has designated market research analyst, the petitioner endeavors to classify the beneficiary as a 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).

In denying the petition, the director determined that “the duties described by the petitioner are more similar to those of a marketing manager” and that the evidence of record did not establish that they comprised a specialty occupation under any criterion of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A). On appeal, the petitioner contends that the evidence of record establishes that the position in question is a market research analyst specialty-occupation position.

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 service center’s 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 and the petitioner’s September 19, 2005 letter submitted on appeal.

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)(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.

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.

Consistent 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.”

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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), CIS consistently 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. 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.

Preliminary to its discussion of the application of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to the evidence in this case, the AAO will explain why it accords no significant weight to the AAO decisions and the “wage library of the U.S. Department of Labor (DOL)” information cited by the petitioner.

The AAO decisions referenced by the petitioner are neither binding nor persuasive. They are not precedent decisions, that is, AAO decisions that have been designated and published as precedents in accordance with 8 C.F.R. §§ 103.3(c) and 103.9(a). While 8 C.F.R. 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. 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), and the record presently before the AAO does not establish the proffered position as a specialty occupation. Further, the DOL’s description of Job Zone 4 at its *O*NET (Occupational Information Network)* Internet site contradicts the petitioner, stating:¹

¹ Excerpt from the Internet at <http://online.onetcenter.org/help/online/zones>.

Job Zone Four: Considerable Preparation Needed

Overall Experience A minimum of two to four years of work-related skill, knowledge, or experience is needed for these occupations. For example, an accountant must complete four years of college and work for several years in accounting to be considered qualified.

Job Training Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.

Job Zone Examples Many of these occupations involve coordinating, supervising, managing, or training others. Examples include accountants, human resource managers, computer programmers, teachers, chemists, and police detectives.

SVP Range (7.0 to < 8.0)

Education Most of these occupations require a four - year bachelor's degree, but some do not.

As evident above, according to the *O*NET* site, DOL's Job Zone Four category includes occupations that do not require at least a bachelor's degree, and a Job Zone Four designation does not indicate the requirement for studies in a specific specialty.

The petitioner describes itself as "a growing clinical laboratory in Southern California that performs complex chemical, biological, hematological, and pathological testing, such as blood testing, mammograms, STD testing, AIDS testing, and others," serving "individuals, hospitals, and other medical facilities."

On appeal, the petitioner defines the beneficiary's duties and responsibilities as follows:

Market Research – 40% of official time/level of responsibility: full

- (1) She will undertake market research and analysis on the following key areas: service positioning; service development; pricing; advertising; customer wants/needs; competitive activities;
- (2) She will analyze and interpret past, present, and future marketing trends and consumer demands for [the petitioner's] services;
- (3) She will conduct opinion research to determine public attitude and acceptance of [the petitioner's] services. The results of these surveys and opinion researches are important in creating a marketing campaign based on the clients' preferences and orientation;

Research Design – 20% of official time/level of responsibility: full

- (4) She will design and set up methods of data collection, processing, analysis, interpretation, reporting and client liaison;

- (5) She will plan and conduct research that answers marketing questions. After the data is gathered, the beneficiary will determine what it means and then write a report for the company recommending courses of action;
- (6) She will design telephone, personal, or mail interview surveys to assess clientele preferences and formulate recommendation for maintaining service quality appreciation [of] clients;

Data Gathering - 20% of official time/level of responsibility: full

- (7) She will gather vital data respecting [the] petitioner's competitors, analyze their service methods, and conduct evaluation of their techniques in marketing promotion and distribution, all of which shall be used for determining the advisability of utilizing new approaches in [the] petitioner's desired markets;

Implementation and Analysis – 20% of official time/level of responsibility: full

- (8) She will work with numbers and statistics;
- (9) She will also handle daily telephone contact with client[s] regarding requests for information and analysis.

Under the relevant statutory and regulatory standards, outlined earlier, 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 in order 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 not 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 evident in the duty descriptions above, the petitioner describes the position exclusively by generalized statements of broad functions. These statements do not relate what the functions would entail when actually operating in the context of the petitioner's business. For example: the petitioner does not identify the analytical methods that the beneficiary would employ in analyzing market trends and consumer demands; does not convey the level of specialized knowledge that would be employed to "design and set up methods of

data collection”; and there is no information about the work involved in the petitioner’s gathering of “vital data” about its competitors.

The AAO notes that the generic statements about the proffered position and its duties are sufficient to align the position with the broad occupational category of market research analysts as discussed in the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*. However, these generalized statements are not sufficiently specific to distinguish the proffered position as a unique, complex, or specialized market research analyst position.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), 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 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 2006-2007 *Handbook*’s section on “Training, Other Qualifications, and Advancement” indicates that a major or concentration in a specific specialty is not a normal aspect of the baccalaureate threshold for entry into the market research analyst occupation:

A bachelor’s degree is the minimum educational requirement for many market and survey research jobs. However, a master’s degree may be required, especially for technical positions, and increases opportunities for advancement to more responsible positions. Also, continuing education is important in order to keep current with the latest methods of developing, conducting, and analyzing surveys and other data. Market and survey researchers may earn advanced degrees in business administration, marketing, statistics, communications, or some closely related discipline. Some schools help graduate students find internships or part-time employment in government agencies, consulting firms, financial institutions, or marketing research firms prior to graduation.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take other liberal arts and social science courses, including economics, psychology, English, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Many corporation and government executives have a strong background in marketing.

As the *Handbook* indicates that entry into the position may occur with a degree with coursework in the listed subjects but without a specific course of study leading to a specific degree in the field, market research analyst positions do not qualify under the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). As the record of proceeding contains no evidence establishing that the proffered position is one that normally requires at least a bachelor’s degree, or the equivalent, in a specific specialty, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

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 with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to 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*, 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 already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. Also, there are no submissions from professional associations, individuals, or firms in the petitioner's industry. The job advertisements that the petitioner submitted into the record have no significant evidentiary weight. The advertisers include firms that are outside the petitioner's industry and therefore outside this criterion's scope of consideration. All of the advertisements are from organizations of different types than the petitioner, a clinical laboratory: they include healthcare insurers; a student association, a chemical company, a global supplier of healthcare equipment, a dental benefits carrier, the American Red Cross, and a brand-identity company. Contrary to the purpose for which they were submitted, the job advertisements demonstrate that the advertising employers do not all require a degree in a specific specialty. The evidence of record does not establish that the work performed at the advertised jobs is substantially similar to the work to be performed in the proffered position.

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." The evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for market research analyst positions, including degrees not in a specific specialty related to market research analysis. As evident in the earlier discussion about the generalized descriptions of the proffered position and its duties, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than market research analyst 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 information about the proffered duties, the proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market research analyst positions that are not usually associated with a degree in a specific specialty.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

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.