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U.S. Citizenship
and Immigration
Services

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FILE: WAC 05 148 50705 Office: CALIFORNIA SERVICE CENTER Date: **JUL 30 2007**

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:

SELF-REPRESENTED

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
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 an importer, exporter and wholesaler of jewelry, and seeks to employ the beneficiary as a marketing analyst. The petitioner endeavors to classify the beneficiary 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 because the position did not qualify as a specialty occupation. On appeal, the petitioner submits a brief asserting that the proffered position is a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides, in part, for the classification of qualified nonimmigrant 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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 are 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) 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; (4) the director's denial letter; and (3) the Form I-290B with supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing analyst. Evidence of the beneficiary's duties includes the Form I-129 with supporting documentation, and the petitioner's response to the director's request for evidence. According to this evidence the beneficiary would:

- Conduct market research analysis and maintain, develop and implement marketing strategies;
- Analyze current and future market trends for the industry in assigned areas which include establishing objectives by forecasting and developing sales plans and projecting expected sales volumes and profit;
- Monitor and coordinate sales trading and transactions as well as appraise jewelry;
- Devise methods to increase profitability, manage expenses and reduce company overhead;
- Analyze statistics and other types of data, such as annual revenues and expenditures to develop solutions to decrease overhead expenses, implement procedures for identifying advertising needs; and
- Review data gathered on competitors and analyze their prices, methods of marketing and distribution then make recommendations and assist in the implementation of the proposal.

The petitioner finds the beneficiary to be qualified to perform the duties of the offered position by virtue of his foreign education and work experience which has been determined by a credentials evaluation service to be equivalent to a bachelor's degree in business administration with a specialization in marketing from an accredited college or university in the United States.

Upon review of the record, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the offered position, or that a degree requirement is common to the industry in parallel positions among similar organizations, as asserted by the

petitioner. Factors often considered by CIS when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the industry requires a degree; whether an industry 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." *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 AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are varied and include duties normally performed by advertising, marketing, promotions, public relations, and sales managers, as well as additional duties performed by general or operations managers. The petitioner contends that the offered position is essentially that of a market research analyst, and that performance of the duties of the position requires a minimum of a bachelor's degree in a specific specialty. The AAO does not agree. While this position requires some market research, it is not a market research analyst position performing pure market research to be used in making corporate business decisions. The market research to be performed, as generally described by the petitioner, appears to be the type normally performed by marketing managers and similar personnel in establishing marketing/promotional, advertising and sales campaigns. The beneficiary would use the research in implementing marketing strategies, and in developing sales plans to project sales volume and profit. These duties, as stated above, are ones normally performed by advertising, marketing, promotions, public relations and sales managers, with some additional duties performed by general or operations managers (devise methods to increase profitability, manage expenses and reduce overhead).

The *Handbook* notes that a wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales manager positions, but that many employers prefer related experience plus a broad liberal arts background. Bachelor's degrees in sociology, psychology, literature, journalism, philosophy, or other subjects are suitable. Requirements will vary, however, depending on the duties of a particular position. For example, some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing, for marketing, sales, and promotion management positions. In highly technical industries such as computer and electronics manufacturing a degree in engineering or science combined with a business degree may be preferred. In public relations management positions some employers prefer a bachelor's or master's degree in public relations or journalism. The *Handbook* notes that most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional or technical personnel. Many managers are former sales representatives, purchasing agents, or promotions specialists. A baccalaureate or higher degree in a specific specialty or its equivalent is not, therefore, the minimum requirement for entry into the position. A degree in a wide range of disciplines will suffice.

The *Handbook* further notes that the formal education and experience of general/operations managers varies as widely as the nature of their responsibilities. Many have a bachelor's or higher degree in business administration or liberal arts, while others obtain their positions by promotion from lower level management positions. Thus, it is possible to obtain a position as a general or operations manager without a college degree by promotion from within the organization based upon performance alone. It is apparent from the *Handbook* that a baccalaureate or higher degree, in a specific specialty, is not the minimum requirement for entry into these management positions. Positions requiring a college degree are filled from a wide range of educational

disciplines. A degree in a specific specialty, however, is not required. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement, in a specific specialty, is common to the industry in parallel positions among similar organizations. In support of this assertion, the petitioner submitted several copies of employment advertisements for marketing related positions. The advertisements submitted, however, do not establish the petitioner's assertion. Many of the advertisements are not from organizations similar in nature and scope to that of the petitioner, and the duties listed in many of the advertisements do not appear to be substantially similar to those to be performed by the petitioner. Some of the advertisements submitted prefer, but do not require, a bachelor's degree in a specific educational discipline. Others require degrees in: marketing; economics; business; business management; business administration; advertising; and liberal arts. These advertisements confirm the *Handbook's* statements about the educational requirements of the position, that a degree in a wide range of disciplines will satisfy the educational requirements of the positions. A degree in liberal arts is not closely related to degrees in business which some of the advertisements require.

In further support of the above noted assertion, the petitioner submitted an opinion letter from [REDACTED] Ph.D., associate professor of marketing, associate dean and Director of Graduate Programs at Seattle Pacific University. [REDACTED] states that the duties of the proffered position meet the criteria of a specialty occupation and require a bachelor's degree in business administration as a job qualification, because the duties of the position are so unique and specialized that they can only be performed by a person with a degree. [REDACTED] does not, however, provide any basis for his opinion such as reference to labor market studies, surveys or generally recognized sources of labor market information. The opinion presented is contrary to the findings noted in the *Handbook* for the educational requirements of the offered position. Simply going on the 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 190 (Reg. Comm. 1972)). The opinion, therefore, is of little evidentiary value. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Finally, the petitioner submitted two additional statements to establish that a degree requirement is common in the industry for parallel positions among similar organizations. [REDACTED] operations manager for California Gold (jewelry distributor), states that it is his company's policy to hire personnel who possess a baccalaureate degree in key positions like marketing and accounting. His opinion did not, however, establish that the duties of the position with his company were substantially similar to the duties to be performed by the beneficiary in this instance. Further, the record does not establish that [REDACTED] company does in fact employ degreed personnel in its marketing or accounting positions. A letter was also presented by [REDACTED] president of Coral Diamonds (a wholesale distributor of polished diamonds), who states that his company routinely hires individuals with bachelor's degrees in key positions. He states that his company hired a marketing analyst with a bachelor's degree. Like [REDACTED]'s opinion referred to above, it does not establish that the duties of the position with his company are substantially similar to the duties to be performed by the beneficiary in this instance. Further, the record does not establish that his company does in fact employ degreed personnel in its marketing analyst position. Again, simply going on the 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 190 (Reg. Comm. 1972)). The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner asserts that it normally requires a degree for the proffered position. The petitioner notes that past positions have been filled by employees holding H-1B visas. The petitioner has not provided documentary evidence (such as copy of a diploma) of any degree held by any present or past employee for the offered position or any similar positions in the company. Going on the 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 190 (Reg. Comm. 1972)). Further, 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 (5th 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 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 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. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, to the extent they are described in the record, the duties to be performed by the beneficiary are not so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. Nor are the duties so complex or unique that they can be performed only by an individual with a degree in a specific specialty. The duties appear to be routine in the industry for marketing manager and operations management positions in the petitioner's work environment, and are regularly performed by individuals with a wide range of education in a number of different disciplines. For example, the record establishes that the petitioner will:

- Conduct market research analysis and maintain, develop and implementing marketing strategies - the petitioner does not specifically detail what tasks would be performed in conducting market research and analysis or what tasks would be performed in developing and implementing marketing strategies. Thus, it is not possible to examine the complexity or uniqueness of the tasks to be performed;
- Analyze current and future market trends for the industry - a detailed description of the tasks to be performed in completing this duty is not provided. Thus, it is impossible to examine the complexity or uniqueness of the tasks to be performed; and
- Monitor and coordinate sales trading and transactions - A detailed description of the tasks to be performed in completing this duty is not provided. Thus, it is impossible to examine the complexity or uniqueness of the tasks to be performed.

The record does not establish that the specific tasks to be performed in this instance require a specific course of study that conveys a body of highly specialized knowledge closely and directly related to the duties of the proffered position. The petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

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 failed to sustain that burden.

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