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U.S. Department of Justice
Immigration and Naturalization Service

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invasion of personal...

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



11 APR 2002

File: EAC-01-077-51630 Office: Vermont Service Center Date:

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a diamond jewelry manufacturing business with 16 employees and a gross annual income of \$18,362,240. It seeks to extend its authorization to employ the beneficiary as a gemologist for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the duties described by the petitioner did not appear to be so complex as to require a baccalaureate degree. On appeal, counsel states, in part, that all of the petitioner's employees, with the exception of the bookkeeper and the inventory manager, hold baccalaureate degrees. Counsel also states that all of the petitioner's gemologists hold baccalaureate degrees as well as expert knowledge of the national and international diamonds and colored stones markets and gemology. Counsel further states that the proffered position is a specialty occupation as its duties have not changed from when the beneficiary was initially approved H-1B status with the petitioner. Counsel also submits a letter from the petitioner's CFO who states that the petitioner requires gemologist training in addition to a baccalaureate degree in any field of study.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

1. Examines gemstones, such as diamonds, jade, sapphires, and rubies, to evaluate their genuineness, quality, and value, utilizing knowledge of gems and market valuations.
2. Examines gem surfaces and internal structure, using polariscope, refractometer, microscope and other optical instruments, to differentiate between stones, identify rare specimens, or to detect flaws, or peculiarities affecting gem values.
3. Immerses stones in prescribed chemical solutions to determine specific gravities and key properties of gemstones or substitutes, which indicate physical characteristics of a stone for gem identification, quality determination, and for appraisal.
4. Grades stones for color, perfection, and quality of cut.
5. Estimates wholesale and retail value of gems, following price grades, market fluctuations, and various economic changes that affect distribution of precious stones.
6. Helps complete an inventory list on a daily basis.
7. Ships out a packet for a jewelry setting specialist per the order of customers, retail and wholesale.
8. May advise customers and others in use of gems to create attractive jewelry item.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in business administration or a related field. Counsel asserts that the Department of Labor has determined that the proffered position is a specialty occupation. However, a reference in the Department of Labor's (DOL) Dictionary of Occupational Titles (DOT), Fourth Edition, 1977, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the DOL in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

The proffered position appears to combine the duties of a jeweler and precious stone and metal worker with those of a marketing manager. A review of the DOL's Handbook, 2002-2003 edition, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a jeweler and precious stone and metal worker. Although colleges and art and design schools offer programs that can lead to a bachelor's or master's degree of fine arts in jewelry design, jewelers usually learn their trade in technical or vocational schools, through correspondence courses, or informally on the job. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

A review of the Handbook also finds no requirement of a baccalaureate degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing managerial positions. Some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing, but many employers prefer those with experience in related occupations plus a broad

liberal arts background. Here again, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background. Thus, the petitioner has not shown that a bachelor's degree in a specialized area or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as business administration, for the offered position. As previously noted, the petitioner's CFO stated in a May 24, 2001 letter that a baccalaureate degree in any field of study is acceptable as long as the gemologist has training in gemology. Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.