



Immigration and Naturalization Service
prevention of unauthorized
invasion of personal privacy

U.S. Department of Justice
Immigration and Naturalization Service

DD

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



File: EAC-01-063-51654 Office: Vermont Service Center

Date: 18 FEB 2002

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)

IN BEHALF OF PETITIONER:



PHILIP [unclear]

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 and jewelry wholesale business with 17 employees and a gross annual income of \$20 million. It seeks to employ the beneficiary as a marketing/sales coordinator 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, which appear to be similar to those of a sales manager, did not appear to be so complex as to require a baccalaureate or higher degree in a specialized area. On appeal, counsel states, in part, that the proffered position is similar to that of a market research analyst and therefore qualifies as a specialty occupation. Counsel further states that the duties of the offered position are more sophisticated than those of a sales manager.

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. Research and analyze market conditions on jewelry and diamonds in the Tri-State area.
2. Evaluate and determine ideal marketing programs to ensure maximum coverage in the Tri-State market area.

3. Liaise with senior management to identify target areas and businesses, with a concentration on small and medium size jewelry stores.
4. Review and ensure that market forecasts and estimates conform to cyclical market trends.
5. Establish and formulate marketing recommendations to outline business strategies for jewelry and diamonds.
6. Coordinate with factories in India, China and Hong Kong delivery of diamonds and finished jewelry products to meet customers' demands.
7. Serve as liaison with factories abroad in manufacturing special orders of jewelry and loose diamonds to meet U.S. standards.
8. Ensure that all deliveries are promptly made and shipments possess require[d] documentation for final review and approval by U.S. customs at ports of entry.
9. Assist in the layouts of booth at shows, and design display units for customers to display our jewelry.
10. Manage inventory of jewelry and diamonds to meet customers' sales orders.
11. Prepare market and sales presentations for customers, industry and management; and,
12. Conduct special market research and forecasts based on information collected from customers, periodicals and surveys made on the diamond/jewelry industry.

The duties described, while quite detailed, are not primarily the responsibilities of a market research analyst as set forth in the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2000-2001 edition. Therefore, the Service is not persuaded to classify the position as the specialty occupation of a market research analyst.

The first reason why the Service is not persuaded to classify the offered position as a market research analyst position concerns the particular duties of the offered position compared with the duties of a typical market research analyst position. At page 148 of the Handbook, the DOL states that "[m]arket research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales." The duties described by the petitioner are not primarily related to the analysis of sales. Rather, the position being offered also

involves duties such as coordinating and serving as liaison with factories, overseeing deliveries, and managing inventory.

The second reason why the Service is not persuaded to classify the offered position as a market research analyst position relates to the type of industry in which the beneficiary would be employed. Information in the Handbook, at page 149, provides insight into the types of industries in which market research analysts are normally found. According to the DOL:

Private industry provided about 4 out of 5 jobs for salaried workers, particularly economic and marketing research firms, managements consulting firms, banks, securities and commodities brokers, and computer and data processing companies.

Although the list of private industry employers is not all inclusive, the DOL's description of a market research analyst's job implies that these types of positions are found within large firms or corporations, such as banks or worldwide pharmaceutical companies.

The record indicates that the petitioner, which is engaged in the wholesale of diamonds and jewelry, employs 17 persons and has a gross annual income of \$20 million. The business of diamond and jewelry wholesale in which the petitioner is engaged, is not within the DOL's list of industries that typically require the services of a full-time individual who performs only market research analyst duties. For these reasons, the Service is not persuaded to label the offered position as a market research analyst position.

Although the Service does not agree with the petitioner that the position it is offering is a market research analyst position, the petitioner could, nevertheless, qualify the offered position as a specialty occupation if the petitioner could establish that:

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.

See. 8 C.F.R. 214.2(h)(4)(iii)(A).

An analysis of the beneficiary's proposed duties reveals that the job being offered is the job of a marketing manager or a market research manager. According to DOL at page 25 of the Handbook:

Marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, including *product development managers* and *market research managers*, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets . . . Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firms's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development.

The beneficiary's proposed job duties, which include researching and analyzing market conditions, evaluating and determining ideal marketing programs, identifying target areas and businesses, reviewing market forecasts, and establishing and formulating marketing recommendations, parallel the job responsibilities of a marketing manager or market research manager. Information at page 25 of the Handbook does not indicate that either position requires a bachelor's degree in a specific field of study. Rather, most employers prefer a wide-range of educational backgrounds or promote individuals from within companies. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Additionally, the petitioner has not provided any evidence that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. Furthermore, the petitioner has not presented 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.

Counsel has provided four letters from individuals involved in the diamond industry. All state that the usual requirement for

positions such as the proffered position is a baccalaureate degree in marketing, business administration, finance, or the equivalent. Four letters are insufficient evidence of an industry standard. The writers have not provided evidence in support of their assertions. In addition, none of the writers have indicated the number or percentage of marketing/sales coordinators who hold such degrees.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding for the position of a market research manager or marketing manager. Therefore, the director's decision is affirmed.

Beyond the decision of the director, the petitioner's labor condition application was certified on December 21, 2000, a date subsequent to December 15, 2000, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.