

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

[REDACTED]

OCT 27 2003

FILE: WAC-02-148-52051 OFFICE: CALIFORNIA 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)

ON BEHALF OF PETITIONER:
[REDACTED]

PUBLIC COPY

INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a diamond importer and wholesaler that employs two persons and has a gross annual income of \$1,800,000. It seeks to employ the beneficiary as a sales and marketing director. The director denied the petition because the position is not a specialty occupation.

On appeal, counsel submits a brief and new evidence in the form of letters from other diamond businesses. Counsel states, in part, that the sales and marketing director position is a specialty occupation in the diamond industry.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The first issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as 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:

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.

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 asserts that the proffered position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title 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 CIS considers. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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.¹ 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 a menial, non-

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

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.

In its initial petition, the petitioner's support letter detailed the job duties to be performed by the beneficiary as follows:

[The beneficiary] will examine and analyze sales statistics to formulate policy and to forecast feasibility of business expansion internationally, as well as to determine the current foreign trend of diamonds and other precious jewelry products. She will develop international sales and marketing policies, campaigns, and strategies to meet the company's goal. She will also develop and coordinate public relations campaigns to promote the company's products[; e]stablish and negotiate contracts with foreign jewelry dealers, stores, and manufacturers[; c]oordinate conversion of products from American to foreign standards and specifications to ensure efficient operation under foreign conditions[; and a]rrange shipping details, such as export licenses, custom declarations, packing, shipping, and routing. [The beneficiary] will participate and recommend decision[s] concerning staffing and she will design and implement a training program to sales representative in various suitable locations in the US and overseas, as well as compensation and incentive programs.

The petitioner stated that the minimum education, training, and experience necessary to perform the position was a bachelor's degree in business administration with a concentration in marketing or the equivalent plus one year of experience in a marketing related occupation.

Subsequent to the filing of the petition, the director requested from the petitioner a detailed job description; the percentage of time to be spent on each duty; the beneficiary's level of responsibility and hours per week of work; the types of employees supervised; the minimum education, training, and experience necessary to do the job; and an explanation why the work requires an individual with a college degree or higher in the occupational field. In response to this request, the petitioner provided the following job description:

[The beneficiary's] job duties will include spending 15% of her time examining and analyzing sales statistics to formulate policy and to forecast feasibility of business expansion internationally; 15% of her time determining the current foreign trend of diamonds and other precious jewelry products; 15% of

her time developing international sales and marketing policies, campaigns and strategies to meet the company's goals; 15% of her time developing and coordinating public relations campaigns to promote the company's products; 10% of her time establishing and negotiating contracts with foreign jewelry dealers, stores and manufacturers; 10% of her time coordinating the conversion of products from American to foreign standards and specifications to ensure efficient operation under foreign conditions; 5% of her time arranging shipping details, such as export licenses, custom declarations, packing, shipping, and routing; 5% of her time working and conferring with upper management; 5% of her time participating and recommending the selection of the company's staff; and 5% of her time designing and implementing a training program [for] sales representatives in various, suitable locations in the US and overseas, as well as compensation and incentive packages. [The beneficiary] will be in charge of two people that will include sales representatives.

The director denied the petition because he determined the position is a sales and marketing manager position not a sales and marketing director position. Citing the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that a wide range of educational backgrounds are suitable for entry into a marketing and sales manager position and some positions are filled by merely promoting experienced staff. The director also cited the petitioner's failure to establish that a degree requirement is common to the diamond industry in parallel positions among similar organizations because most of the evidence submitted was from dissimilar businesses.

On appeal, counsel states that the sales and marketing director position is a specialty occupation in the diamond industry. Counsel submits new evidence in the form of letters from other diamond businesses and one trade association as follows: (1) Mr. Sunil Jain, Vice-President of the Indian Diamond and Colorstone Association (U.S.A.), Inc. (IDCA); (2) Mr. Steve Young, Business Manager for Inta Gems; (3) Ms. Annie Diel, Manager for Diamond Design Company; and (4) Mr. Nirav Shah, President of Sanghavi Diamonds, Inc.

The petitioner has not met any of the requirements to qualify the offered position as a specialty occupation. The position's duties include sales trends determinations, public relations and marketing policy and campaign development, and some contract negotiation and personnel administration. The position is most analogous to a marketing and sales manager position as delineated

in the *Handbook*; however, a marketing and sales manager position is not a specialty occupation.

The *Handbook*, 2002-2003 edition, at page 27, describes the duties to be performed by a marketing and sales manager as follows:

Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

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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—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm'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. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

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Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. . . . Managers advise the sales representatives on ways to improve their sales performance. . . . Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers. Such information is vital to develop products and maximize profits.

The *Handbook's* description of duties for a marketing and sales manager reflects the duties and responsibilities of the petitioner's proffered position. A review of the *Handbook*, at page 28, finds no requirement of a baccalaureate or higher degree

in a specific specialty for employment as a marketing and sales manager:

A wide range of educational backgrounds are suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotion management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing.

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Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional or technical personnel.

The *Handbook* clearly shows that a marketing and sales manager does not require a bachelor's degree in a specific field of study to enter into the position. Instead of specifying a specific field of study required to enter into the field, the *Handbook* delineates a multitude of educational backgrounds that could be preferred but not required by prospective employers. Additionally, as the director noted, most marketing and sales manager positions are filled by promoting experienced internal staff members. (Emphasis added.) Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard 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." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). The *Handbook*, as discussed above, does not report that marketing and sales managers require a degree.

Additionally, the evidence in the record is insufficient to support that a degree requirement is common to the industry in parallel positions among similar organizations. Two letters were submitted with the petitioner's initial petition: (1) a letter from Ms. Celia Tuazon-Concepcion, President and General Manager of Back to Nature International Manufacturing, Inc., and (2) a letter from Mr. Joseph Koreie, Owner of Shana Insurance Services. As the director correctly determined, these businesses are not similar to the petitioner's business and thus do not establish that a degree requirement is common in parallel positions among similar organizations.

The evidence submitted on appeal is also insufficient to establish that a degree is required for the diamond industry in parallel marketing and sales manager positions among similar diamond businesses. For example, Mr. Jain's letter, which is not notarized and has no corresponding corroborating documentation, states the following:

[IDCA] is comprised of mostly companies of the same ethnic background engaged in the wholesale purchase and sale of both cut and uncut diamonds of all shapes and sizes here in the United States. I am proud to say that our members have annual gross sales of over \$400 million. . . .

. . . .

The diamond trade is unique primarily because we deal with one of the rarest commodities in the world. Diamonds are somewhat similar to snowflakes - no two diamonds are exactly alike. And pricing diamonds involves a complex evaluation based on its 4C's - Color, Cut, Clarity, and Carat. This is why it is often said that diamond grading is indeed subjective, in that at least two graders must agree and trust each other's judgment on how a diamond is supposed to be grade[d]. Same goes for customers and dealers. Without trust, there will be no sale and purchase. Thus the industry employs many different marketing specialists and managers in order to enhance sales and build a stronger bond with customers.

Marketing campaigns often try to impress upon its audience that its diamonds are of highest quality and that the seller and/or its employees have integrity, sophistication, and professionalism. As such, an in-house marketing/public relations specialist must be the embodiment of these values since this position is very high profile and comes into regular business contact with equally sophisticated professionals. And he/she

must be a college graduate with an excellent command of the English language and with some prior experience in marketing and/or public relations.

Mr. Jain's association is apparently for businessmen from India engaged in the diamond trade industry and does not comprehensively include all diamond businesses operating in the United States. Mr. Jain sets forth aspirational goals - that the industry should have college graduates in its marketing and sales management positions - but he does not attest that the industry currently unequivocally requires only degreed individuals in such positions. He writes that trust, sophistication, and professionalism are attributes sought in marketing and sales managers, but does not specify the ability to theoretically and practically apply a body of highly specialized knowledge. Additionally, Mr. Jain does not specify that marketing and sales managers in the diamond industry require a degree in a specialty occupation. He only mentions a general college degree and "an excellent command of the English language."

Mr. Young's letter states the following:

We are engaged in the business of fine jewelry and loose diamonds.

Our company regularly hires the services of an international sales and marketing director to develop the company's detailed sales and marketing plan. Our director's job is to determine the demand for products and services offered by the company and our international competitors, to identify customer needs, to direct the preparation of special promotions, to monitor and analyze sales results, to determine the cost effectiveness of specific promotional campaigns on the sale of a particular product, and to plan and prepare advertising and promotional materials and arrange [sic] for publicity, to aid in the determination [sic] of the terms of a sales [sic] contract and to help arrange product insurance.

Due to the complicated nature of our business, an international sales and marketing director for our company must possess a baccalaureate degree in either business, management, administration, marketing, commerce or a closely related field.

Mr. Young's letter, which is not notarized and has no corroborating evidence attached, provides no information concerning his business's size or capitalization. Thus, the record does not contain evidence that Mr. Young's business is a similar organization to the petitioner's business. Additionally,

Mr. Young does not unequivocally attest and provide documentary proof that all of his business's marketing and sales managers have bachelor's degrees in a specialty occupation and have held such degrees historically.

Ms. Diel's letter states the following:

We are engaged in the trade of fine jewelry and loose diamonds. We currently have a staff of three people, including an international sales and marketing director.

The jewelry business is a highly complicated and competitive field, requiring the services of an educated person who has a thorough understanding of international laws, customs and difficult terms. A salesperson may understand the color, clarity, carat and cut of a jewelry or diamond. But, only a sales and marketing director with a baccalaureate degree in either business administration, marketing, management, public relations, finance, commerce, advertising or a closely related field, can fully and competently explain the terms of a contract and a major sale to a customer they have enticed in to [sic] buying one of our products through many hours of market research determining potential markets, customer needs, demands and pricing.

Ms. Diel's letter, which is not notarized and has no corroborating evidence attached, does not unequivocally attest and provide documentary proof that all of her business's marketing and sales managers have bachelor's degrees in a specialty occupation and have had historically.

Mr. Shah's letter states the following:

We are importers and wholesalers of cut and uncut diamonds of all cuts and sizes serving both California and non-California customers. We have, on average, gross annual sales of US \$14 million.

. . .

The companies who I do business with normally employ managers and representatives with minimum B.A. degrees.

Mr. Shah's letter, which is not notarized and has no corroborating evidence attached, does not set forth a requirement that a marketing and sales manager have a bachelor degree or higher or its equivalent in a specialty occupation. He states

that individuals holding a B.A. degree, presumably in any field, are "normally" employed in the industry. Additionally, no information is provided about the size and capitalization of the entities with which Mr. Shah does business. Thus, there is insufficient information to determine that these businesses are similar to the petitioner's business.

The trade association letter and the letters from businesspersons in the diamond industry, submitted on appeal, are insufficient to establish the second criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. The petitioner offered no evidence concerning its past hiring practices for the proffered position. Thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, there is no evidence to support that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties are usually associated with the attainment of a baccalaureate or higher degree. The position involves sales trends determinations, public relations and marketing policy and campaign development, and some contract negotiation and personnel administration. As noted above, these duties reflect the duties delineated in the *Handbook* for marketing and sales manager positions that do not require a bachelor's degree in a specialty occupation. These are not complex duties that require the application of specialized and complex knowledge. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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 not sustained that burden.

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