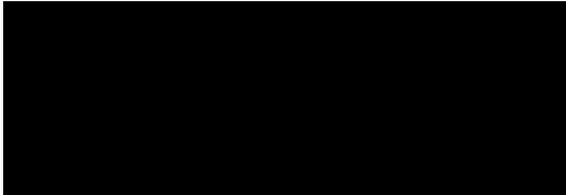




U.S. Citizenship
and Immigration
Services

D2



FILE: EAC 02 150 53137 Office: VERMONT SERVICE CENTER

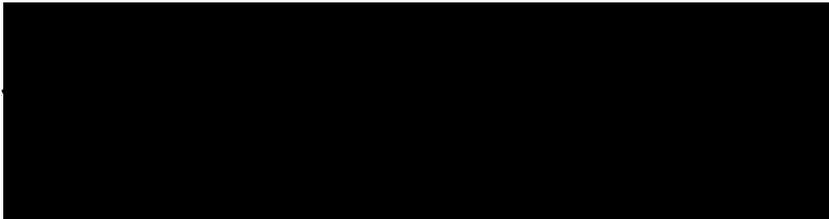
Date: **AUG 03 2004**

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:



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, Director
Administrative Appeals Office

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**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The director of the service center 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 diamond dealer and jewelry manufacturer that seeks to employ the beneficiary as a marketing analyst. The petitioner, therefore, 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 proffered position is not a specialty occupation. On appeal, counsel states that the proffered position qualifies as a specialty occupation and submits additional evidence.

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.

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.

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) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and 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, in part: the Form I-129; the attachments accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail examining and analyzing research data to forecast future trends in the designer jewelry and precious/semi-precious stone industry; collecting, compiling, classifying, and analyzing data on customer preferences; analyzing the design, promotion, price, and distribution of services to increase sales and profitability; identifying market opportunities and monitoring market performance; generating, refining, and evaluating marketing strategies; and conducting profitability studies to increase sales and overall market share. The petitioner stated that a candidate must possess a bachelor's degree in business administration-marketing, economics, or statistics.

The director was not convinced that the proffered position qualified as a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director found the submitted opinion letters unpersuasive. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that the proffered position's duties somewhat resemble those of a market research analyst. Nonetheless, the director stated that the petitioner was unsuccessful in establishing that the beneficiary would perform market research analyst duties. The director explained that the nature of the petitioning entity, a small company specializing in diamond and jewelry manufacturing, would not require the services of a professional marketing analyst. The director remarked that because the petitioner was willing to hire a candidate without a master's degree for the position, it did not seem to be a marketing analyst position as described in the *Handbook*.

On appeal, counsel claims that the director's decision is erroneous and contrary to the weight of evidence. Referring to various editions of the *Handbook*, counsel claims that the DOL never stated that only candidates with graduate degrees are qualified to perform a marketing analyst position. Counsel contends that in small organizations a person with a bachelor's degree or its equivalent in economics or marketing is qualified to perform a market research position. According to counsel, the petitioner is in the hospitality industry. Counsel states that firms of a comparable size to the petitioner customarily employ candidates possessing bachelor's degrees in marketing or economics or a business-related field. Counsel contends that the proffered position's duties are not entry-level, and furthermore claims that the petitioner prefers a bachelor's degree in marketing for the position. Counsel cites a number of cases to claim that a marketing research analyst is a specialty occupation. Counsel furthermore cites *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal. 1989) to state that the court in the case held that the size of a petitioner, the tendered salary, and the absence of a past hiring practice are not relevant in determining whether a position qualifies as a specialty occupation. Counsel mentions that the petitioner, a jewelry business established in 1998, has an asset base of about \$2 million. Counsel claims "the employer had been hiring qualified professionals having a [b]accalaureate [d]egree for the job in question." Counsel claimed to submit details about these employees. According to counsel, the industry requires a bachelor's degree in business administration with a concentration in marketing. Referring to the DOL's *Dictionary of Occupational Titles (DOT)*, counsel contends that the job

description of a marketing analyst mirrors the proffered position. Counsel mentions that the SVP rating in the *DOT* suggests that the position requires a bachelor's degree, and then counsel cites *Hong Kong T.V. Video Program Inc. v. Ilchert*, 685 F. Supp. 712 (N.D. Cal. 1988) to state that substantial weight should be given to the *DOT* rating. Counsel narrates the *Handbook's* information about a marketing manager position as well as its educational requirements. Counsel avers that the fact that over 500 colleges and universities offer programs in marketing implies that the proffered positions duties of marketing analysis and research require considerable theoretical and practical training. Finally, counsel cites a number of cases involving marketing analyst positions that the AAO found qualified as specialty occupations.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO wishes to point out that the record contains many unexplained inconsistencies. The industry of the petitioning entity is brought into question. The Form I-129 stated that the petitioner is a diamond dealer and jewelry manufacturer; yet, page five of the petitioner's March 28, 2002 letter contradicts this. Here, the petitioner claimed to be in the travel industry, and on the same page, to be in the communications industry. In a November 15, 2002 letter, counsel asserted that the petitioner is in the athletic industry. On page three of the appeal brief, counsel claims that the petitioner is in the hospitality industry; on page six he states that it is the jewelry industry. Another example is that the Form I-129 stated that the petitioner was founded in 1980. Counsel in the appeal brief and in the November 15, 2002 letter claimed that the petitioner was founded in 1998. The petitioner's asset base is also unclear. The November 15, 2002 letter stated that it is \$62 million; in the appeal brief counsel states it is merely \$2 million. Because of such apparent inconsistencies, the evidentiary weight of these statements is diminished. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO will next consider the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in the *DOT*. However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

The DOL has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that

occupation. The *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the DOL has assigned it a specific SVP rating in the *DOT*.

Counsel cites *Young China Daily* to state that the court in the case held that the size of a petitioner, the tendered salary, and the absence of a past hiring practice are not relevant in determining whether a position qualifies as a specialty occupation.

In determining whether a position qualifies as a specialty occupation under the first criterion, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. CIS does not rely on the size of the petitioner and the amount of the proffered salary. Nor does it rely on the absence of a prior record of hiring members of the professions in a case involving a newly created position.

A review of the job description reveals that counsel seeks to “supplement” and thereby modify the duties of the job. In the November 15, 2002 letter and the appeal brief, counsel “supplements” the job description without the petitioner’s assent. These statements of counsel on appeal and in the letter are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). Therefore, the AAO will disregard the statements that “supplement” the job description.

The beneficiary’s primary duties are to research trends in the jewelry industry; collect and analyze data on customer preferences; analyze designs, promotions, prices, and distribution to increase sales and profitability; identify market opportunities and monitor market performance; develop marketing strategies; and conduct profitability studies in order to increase sales and overall market share. In the appeal brief, counsel maintains that performing the duties of the position requires candidates to identify: (1) where the competitive advantage lies in the marketplace; (2) how to best sell products; (3) the optimal price of products; (4) strategies to increase market share; and (5) dynamic trends.

The AAO wishes to note that on page five of its March 28, 2002 letter the petitioner claimed:

Because we deal with a wide range of consumers, and offer a wide range of travel related services, it is necessary for us to employ a [m]arketing [a]nalyst, [sic] in order to successfully tackle this volatile market. We expect our [m]arketing [a]nalyst to examine and analyze statistical data on the services provided by us, and be able to forecast future marketing trends for the company. It is also necessary to stay abreast with the latest trends in the travel industry by conducting public opinion research, designing surveys and questioners [sic] and carrying out telephone or personal interviews to evaluate the consumer[']s scope of satisfaction, and identify the preferences of our wide and diverse consumer platform.

The quoted passage by the petitioner relates to the travel industry; it does not relate to the jewelry industry. Accordingly, the AAO will not consider the duties of conducting public opinion research, designing surveys and questionnaires, and carrying out telephone or personal interviews to evaluate consumer satisfaction and identify consumer preferences as applicable to the proffered position.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* reveals that a marketing analyst is a specialty occupation. However, a market analyst would not perform the beneficiary's duties; the *Handbook* reveals that they are performed by marketing and sales managers. According to the *Handbook*, marketing managers develop a firm's detailed marketing strategy. With the help of subordinates, marketing managers determine the demand for products and services offered by the firm and its competitors; in addition, they identify potential markets such as business firms, wholesalers, retailers, or the general public. The *Handbook* further states that marketing managers develop a 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, the *Handbook* explains that marketing managers monitor trends that indicate the need for new products and services and oversee product development. The *Handbook* further relates that sales managers direct the firm's sales program, analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements, and monitor the preferences of customers. This information is vital to develop products and maximize profits.

The *Handbook* reports that employers find a wide range of educational backgrounds suitable for entry into marketing manager and sales positions. Under the *Handbook*, for example, an employer may find that a person with experience in a related occupation and an associate or bachelor's degree in any field of study suitable for a sales or marketing manager position. Specifically, for marketing, sales, and promotion manager positions the *Handbook* provides that some employers prefer a bachelor's or master's degree in business administration with an emphasis in marketing; most employers do not normally require a bachelor's degree in a specialized field. Thus, according to the *Handbook*, the offered position would not qualify as a specialty occupation because only some employers require a bachelor's degree in a specific specialty.

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - the record contains letters from seven businesses. These letters are not persuasive in establishing the second criterion.

[REDACTED] Gem
[REDACTED] all stated that they employ a marketing analyst with a bachelor's degree in business administration. However, a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility. The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *Matter of*

Michael Hertz, Assoc., 19 I&N Dec. 558, 560 (Comm. 1988).

The letters from Globex USA Inc. and S & J Diamond Corporation do not establish a specific degree requirement in the petitioner's industry. Globex USA Inc. is in the information technology industry; it is dissimilar from the petitioner's jewelry industry. S & J Diamond Corporation provides no independent corroborating evidence to support its assertions about an industry-wide degree requirement. Last, the letters from Marvin Impex Inc., Globex USA Inc., and Simply Diamonds, Inc. contain nearly identical passages. Similarly, the letters from Jay Gems Inc., S&G Star, and Gem Wave Inc. have nearly identical passages. The individuals in these companies have, supposedly independently, written letters containing substantially identical passages. While we acknowledge that these individuals have endorsed the petitioner's position regarding the requirement for a bachelor's degree, the exact wording of the letters carries diminished weight, as it may not necessarily reflect the exact views of the person who signed it. Consequently, for the reasons set forth above, the petitioner fails to establish the second criterion.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

Counsel claims that the employer had hired candidates possessing a baccalaureate degree for the position. Yet, there is no evidence in the record that would support counsel's statement even though counsel professes to submit details of the employees and their degrees. Consequently, the petitioner fails to satisfy the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that it normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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 refers to a multitude of AAO decisions that found that a marketing analyst position qualified as a specialty occupation. According to counsel, the fact that over 500 colleges and universities offer programs in marketing implies that marketing analysis and research duties require considerable theoretical and practical training.

Counsel's statements do not prevail in establishing the fourth criterion. The director did not state that a marketing analyst is not a specialty occupation; he concluded correctly that the proffered position did not seem to be one of a marketing analyst and, therefore, it does not require a baccalaureate degree, or its equivalent, in a specific specialty. Furthermore, counsel's observation that 500 U.S. colleges or universities offer degrees in marketing has no relevance to these proceedings. Many colleges and universities offer programs in various fields of study; this does not mean that a position in one of these fields would require a specific baccalaureate degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.