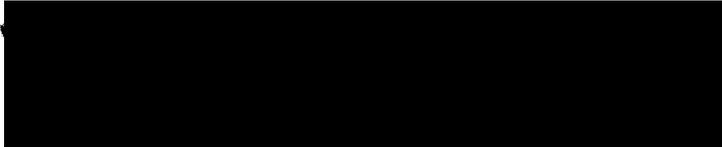


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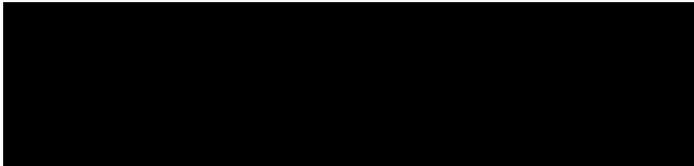
DR

FILE: WAC 04 159 52982 Office: CALIFORNIA SERVICE CENTER Date: DEC 22 2005

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:



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

DISCUSSION: The director of the California 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 an importer and wholesaler of sterling silver jewelry, with three employees. It seeks to employ the beneficiary as a marketing management analyst 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 he did not find the proffered position to meet any of the criteria required for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request; and (4) the director's denial; and (5) Form I-290B, with a letter from the petitioner responding to that denial. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states it seeks the beneficiary’s services as a marketing management analyst. Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 13, 2004 letter of support; and its July 1, 2004 response to the director’s request for evidence. As described by the petitioner, the proffered position would require the beneficiary to study its products, pricing, distribution and promotional strategies, and to implement marketing strategies. To carry out these responsibilities, the beneficiary would:

- Conduct research, conceptualize and develop new product lines of ethnic jewelry, including beaded and silver jewelry including research of the competitive environment, and target markets for sales in the United States;
- Explore new target areas for jewelry products and establish partnerships with other business entities including distributors in India, Thailand, and other countries, and retailers in India and the United States;
- Study the petitioner’s pricing strategies, specifically price elasticity, and recommend optimal pricing strategies for the sale of rings, bracelets, necklaces, anklets, and brooches;
- Develop promotional strategies aimed at targeted areas including marketing communication strategies;
- Design and coordinate promotion through direct mail and printed advertising in ethnic newspapers and magazines;
- Develop distribution strategies to reduce distribution costs by researching shipping options; and
- Develop and implement a marketing strategy for the company on a five-year cycle.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular

occupations, reports 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director, relying on the 2004-1005 edition of the *Handbook*, concluded not only that the duties outlined by the petitioner did not impose a degree requirement on the beneficiary, but that the petitioner did not have the organizational complexity or marketing/advertising experience to validate its need for the proffered position. While, as discussed below, the AAO has also concluded that the proffered position does not qualify as a specialty occupation, it does not agree with the director's findings regarding the petitioner's need for a marketing position. The petitioner is an importer and wholesaler of jewelry, and, like many businesses, seeks to expand its client base and increase its sales. Its desire for marketing assistance appears related to the nature of its business, not the structure of its business. The AAO finds no indication in the listing of duties provided by the petitioner, either in its letter of support or its response to the director's request for evidence, that it seeks the beneficiary's services to manage an existing marketing staff or program. Accordingly, the AAO finds the director to have erred in relying on the petitioner's lack of organizational complexity, i.e., the absence of a department for the beneficiary to manage, and institutional marketing experience as bases for his denial of the petition.

Based on the duties described by the petitioner, the AAO has concluded that the proffered position most closely resembles that of a marketing manager, described by the *Handbook* under the occupational title of advertising, marketing, promotions, public relations, and sales managers. In reaching this determination, the AAO has considered whether the analytical duties outlined by the petitioner might reflect the work of market or marketing research analysts, an occupation that requires those seeking employment to hold a master's degree in a directly related field. As discussed at pages 173-174 of the *Handbook*:

Market or marketing, research analysts are concerned with the potential sales of a product or service They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways.

The AAO finds that it is market research analysts' work in the design, development and supervision of original market research that sets this occupation apart from the work of marketing managers, employment that also requires incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicated that the beneficiary would analyze its

products, pricing, distribution and promotional strategies, business, it has not described the type of original research and analysis performed by market research analysts.

Instead, as previously noted, the AAO finds the proffered position's duties to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business and marketing strategies. As discussed at pages 23-24 of the *Handbook*:

The objective of any firm is to market and sell its products or services profitably Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

...

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 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

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* at pages 24-25, for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

A wide range of educational backgrounds is 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

For marketing, sales, and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous

...

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field. Accordingly, the proffered position cannot be established as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of its degree requirement, the petitioner has indicated that employment identical to that of the proffered position is assigned a Specific Vocational Preparation (SVP) rating of 7 by the Department of Labor's *Dictionary of Occupational Titles (DOT)*. However, the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

On appeal, the petitioner contends that the duties of the proffered position are different from those of a marketing manager. It asserts that marketing managers merely implement the marketing strategies handed down to them while the beneficiary would be responsible for examining its current marketing operations with a view to changing those operations or introducing entirely new methods. The AAO does not agree. Its reading of the *Handbook* finds its description of the work performed by marketing managers to reflect the duties that the petitioner has indicated would be performed by the beneficiary as its marketing management analyst. According to the *Handbook*, marketing managers do not merely implement marketing strategies, but first develop those strategies. Further, those who are employed as marketing managers have responsibility for determining the demand for the products or services of the firms employing them, for identifying potential markets, for developing pricing strategy, monitoring trends that indicate the need for new products, overseeing product development, and promoting products and services. Contrary to the petitioner's assertions on appeal, the proffered position, as described, is that of a marketing manager.

To differentiate the proffered position from that of a marketing manager, the petitioner also indicates that the beneficiary would be required to help "the marketing team, including sales associates." The AAO notes, however, that the record does not establish that the petitioner has a marketing team. The organizational chart submitted by the petitioner in response to the director's request for evidence indicates that, at the time of filing, the petitioner's staff consisted of a general manager, an accountant, and a sales representative. Nor has the petitioner previously indicated the beneficiary would perform such duties. On appeal, a petitioner may not offer a new position to a beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N 248, 249 (Reg. Comm. 1978). Accordingly, the AAO will discount the petitioner's statements regarding the beneficiary's relationship to its marketing team as a basis for distinguishing the proffered position from the occupation of marketing manager.

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an

individual with a degree in the specific specialty. However, the record contains no evidence that responds to either of the criterion's prongs and, therefore, cannot establish the proffered position as a specialty occupation based on an industry-wide degree requirement or its complex or unique nature.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, CIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. However, in response to the director's request for evidence, the petitioner indicated that it had not previously employed anyone to perform the marketing duties described at the time of filing. Accordingly, the petitioner cannot establish the proffered position as a specialty occupation based on its normal hiring practices with regard to that position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, the petitioner asserts that the duties of the proffered position – conducting research on target markets and identifying these markets within the United States, establishing partnerships with retailers within the target markets, and designing pricing, distribution and promotional strategies – are complex in nature and that they must be performed on an “international level.” To indicate the complexity of its organization, the petitioner notes that many of its distributors are in Southeast Asia, while its goods are marketed in the United States and India. It states that it operates from offices in both the United States and India, and employs sales representatives at each location. These statements are, however, insufficient to establish the proffered position as a specialty occupation based on the specialization and complexity of its duties.

While the marketing materials submitted by the petitioner in response to the director's request for evidence indicate that it has an office in New Delhi, the record offers no other documentation related to the international nature of its business operations or the extent or complexity of those operations. The petitioner has submitted no evidence of contracts/agreements with or invoices from Thai manufacturers, nor similar evidence related to Indian retailers to establish these business dealings. Neither has it provided an organizational chart for its New Delhi office or, otherwise, documented the actual operations of that office. In the absence of such evidence, the record does not establish that the petitioner has the type of international business dealings it describes on appeal. Going on record without supporting documentary evidence is not sufficient to meet the petitioner's 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 Dec. 190 (Reg. Comm. 1972)).

Accordingly, although the AAO notes that the proffered position's duties would require the beneficiary to establish partnerships with distributors in India and Thailand and with retailers in India and the United States, it does not find these duties to meet the specialized and complex threshold of the fourth criterion. The petitioner has not established that the nature of its international operations would require the beneficiary to have greater knowledge or skills beyond those normally possessed by marketing managers, many of whom routinely deal with foreign suppliers and overseas markets. Nor has it demonstrated that the proffered

position represents an amalgam of jobs that would require him to have skills and qualifications beyond those of a marketing manager. Therefore, the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.