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FILE: WAC 02 288 52869 Office: CALIFORNIA SERVICE CENTER Date: FEB 07 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 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 fine jewelry that seeks to employ the beneficiary as a marketing specialist. 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: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief.

The AAO will first discuss the director's determination that the proffered position is not 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.

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 specialist. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail researching market conditions for sales and services in local, regional, or national areas; establishing a research methodology and design format for gathering data through surveys, opinion polls, or questionnaires; examining and analyzing statistical data to forecast marketing trends; analyzing business trends and developing strategies to project revenues; gathering data on competitors and analyzing their process, sales, and marketing methods and distribution; collecting data on customer preferences and buying habits; preparing a comprehensive market study of local industries and competitors in surrounding areas; determining whether to add new services, open branches, or otherwise diversify operations; and tapping into new markets and introducing innovative products and services. The petitioner stated that a candidate must possess a bachelor's degree in marketing.

The director determined that the proffered position was not a specialty occupation. Referring to the *Occupational Outlook Handbook* (the *Handbook*), the director stated that the proffered position's duties are performed by marketing managers, and that the *Handbook* reveals that many firms prefer or desire a bachelor's or higher degree, though this is not a normal industry-wide requirement for entry into the occupation. According to the director, the proposed duties and stated level of responsibility did not indicate a level of complexity or authority beyond what is normally encountered in the field. The director found the submitted evidence unpersuasive in establishing that the proposed position qualified as a specialty occupation. Finally, the director concluded that the beneficiary was not qualified to perform the duties of a specialty occupation.

On appeal, counsel states that the director misclassified the proffered position as a marketing manager. Counsel narrates the *Handbook's* and the *Occupational Information Network's (O\*Net)* description of a marketing manager, and points out that the beneficiary will not perform some of the duties attributed to a marketing manager such as administering and organizing marketing activities, supervising subordinate employees, and coordinating managerial personnel. Counsel states that the beneficiary will mostly engage in market research, and make recommendations that are based on studies and surveys performed by the beneficiary. Counsel maintains that this is not the executive-level position of marketing manager. According to counsel, the *Handbook*, *O\*Net*, and submitted evidence reveal that the proffered position resembles a market research analyst. Finally, counsel states that the beneficiary is qualified to perform the duties of the proffered position.

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 first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position; a specific 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 in a specific specialty. 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)).

In response to the request for evidence, which requested a detailed description of the job description, counsel submitted a letter dated November 26, 2002. Although this letter elaborated on the beneficiary's proposed duties, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Accordingly, the statements of counsel in the letter that elaborate on the job description carry no weight in this proceeding.

In determining whether a position qualifies as a specialty occupation, 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. 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 the proffered position's duties do not rise to the level of a marketing analyst job, which is a specialty occupation. The *Handbook* reports that one key responsibility of a marketing analyst is to devise methods and procedures for obtaining data; for instance, designing telephone, mail, or Internet surveys to assess consumer preferences, and have trained interviewers under the marketing analyst's direction. Although the petitioner stated that the beneficiary would establish research methodology and design a format for data gathering, it described the beneficiary's duties generically without specificity as to the beneficiary's daily activities. As already discussed, counsel's assertions in the November 26, 2002 letter that elaborated on the proffered position's duties carry no weight in this proceeding. Therefore, the AAO cannot determine whether the proffered position's duties actually rise to the level of those performed by a marketing analyst.

In addition, the *Handbook* does not indicate that a market and survey researcher would normally be employed by an importer and wholesaler of jewelry. The *Handbook* reports:

Market and survey researchers held about a total of 155,000 jobs in 2002. Most of these jobs were held by market research analysts, who held 135,000 jobs. Private industry provided about 97 percent of salaried market research analyst jobs. Because of the applicability of market research to many industries, market research analysts are employed in most industries.

The industries which employ the largest number of market research analysts are management, scientific, and technical consulting firms, insurance carriers, computer systems design and related firms, software publishers, securities and commodities brokers, and advertising and related firms.

Finally, unlike the petitioner's requirement of a bachelor's degree in marketing, the *Handbook* relays that a master's degree is the minimum requirement for many private sector market and survey research jobs. Although the *Handbook* reports that bachelor's degree holders who majored in marketing and related fields may qualify for many entry-level positions, it explains that these entry-level positions might or might not be related to market and survey research, and that such positions "include research assistant, administrative or management trainee, marketing interviewer, and salesperson, among others." The difference between the petitioner's educational requirement and the one described in the *Handbook* suggests that the petitioner's proffered position does not rise to the level of a market research analyst.

Based on the evidentiary record and the *Handbook's* information, the petitioner fails to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, marketing specialist.

Counsel refers to *O\*Net* to claim that the proffered position resembles a market research analyst. However, the DOL replaced *O\*Net* with the *Dictionary of Occupational Titles (DOT)*. 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 the occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because of information in the *O\*Net*.

To establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the evidentiary record contains job postings. For various reasons, the job postings fail to establish the second criterion. Three of the organizations in the postings are dissimilar from the petitioner, an importer and wholesaler of jewelry. Southwest Missouri State University; OPAL-RT Technologies, Inc., a provider of open, scalable, real-time simulation and control; and California Special Districts Association, a political organization, differ in nature from the petitioner. There is no information about Pan American Life; therefore, the AAO cannot determine whether it is similar to the petitioner. The information from San Jose State University, Rutgers University, University of Montana-Missoula, and University of North Carolina Wilmington did not describe the duties of the highlighted positions; thus, the AAO cannot determine whether the highlighted positions are similar to the proffered position. In addition, the AAO cannot determine from the submitted information whether the organizations that employ the highlighted positions are similar to the petitioner. For these reasons, the postings cannot establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

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 in a specific specialty. Again, the *Handbook* discloses that the beneficiary's duties do not rise to the level of a marketing analyst.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent in a specific specialty 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 in a specific specialty. As already discussed, the proffered position's duties do not rise to the level of a marketing analyst job, which is a specialty occupation. Consequently, the petitioner fails to satisfy the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 on this ground.

The AAO will next discuss the director's conclusion that the beneficiary is not qualified to perform the duties of the proffered position.

The AAO has already determined that the proffered position is not a specialty occupation. Nonetheless, the beneficiary is not qualified to perform the duties of the proffered position had it been determined to be a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The record of proceeding before the AAO contains, in part: (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. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a market research analyst. The petitioner stated that a candidate must possess a bachelor's degree in marketing.

The director found that the beneficiary was not qualified for the proffered position because the beneficiary's education, experience, and training were not equivalent to a baccalaureate degree in a specialty required by the occupation. On appeal, counsel states that the beneficiary is qualified for the position based on an educational evaluation and her work experience.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in marketing. The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study. The beneficiary does hold a foreign degree determined to be equivalent to a baccalaureate degree in elementary education from an accredited university in the United States. Because the field of marketing is entirely different from elementary education, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or

- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

On appeal, counsel refers to an educational evaluation from e-ValReports, a company that specializes in evaluating academic credentials. The evaluator concluded that the beneficiary possesses the equivalent of a bachelor's degree in marketing. However, the evaluation is based upon the beneficiary's education and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>1</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or

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<sup>1</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The record contains an employment letter from Wil-Lyn Agrivet Supply, a family owned business, which stated that the beneficiary was employed there from May 1990 to December 2001 as marketing manager. The letter stated that her job duties included promoting products, purchasing and delivering products and supplies, researching competitor's prices and marketing trends, scheduling and conducting marketing campaigns, advertising, dusting, restocking, and changing ticket prices.

As described by the employer, the beneficiary's duties do not involve the theoretical and practical application of specialized knowledge required by the proffered position, which in this case is marketing. The employer described the beneficiary's duties generically; no specificity as to the beneficiary's daily activities or her level of responsibility is provided. Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge in marketing. Furthermore, the employer does not indicate that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in marketing.

Finally, there is no evidence that the beneficiary has recognition of expertise. The AAO notes that the evaluator from e-ValReports cannot be considered a "recognized authority" because the evaluator did not indicate employment or academic training in the field of marketing.

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. For this additional reason, the petition will be denied.

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.