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Services

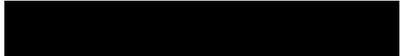
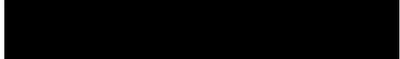
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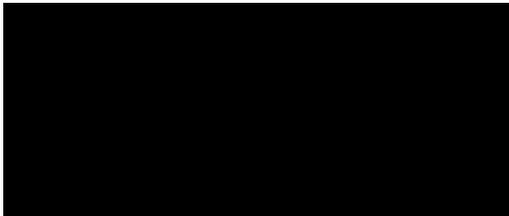
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FILE: WAC 04 077 53184 Office: CALIFORNIA SERVICE CENTER Date: **SEP 21 2005**

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

**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 subsidiary of a large diamond manufacturer that is located in Russia. It seeks to employ the beneficiary as an import director. 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 previously submitted evidence.

Section 214(i)(1) of the Immigration and Nationality Act (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 an import director. Evidence of the beneficiary's duties includes, in part: the Form I-129; the attachments accompanying the Form I-129; the petitioner's 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 transporting imports through overseas company representatives; formulating import/export policies; managing daily operations; planning the use of materials and human resources in the company's import operations; purchasing diamonds and coordinating their transportation; directing investment negotiations; having responsibility for a feasibility study that analyzes diamond mining, diamond cutting, and other investment projects within the U.S.; performing a study analysis of diamond cutting and other investment projects; designing a strategy on selecting financial and legal consultants and auditors and tender conditions; examining and analyzing statistical data to forecast future company needs; managing the control and governance of the daughter company; and determining potential import/export demands of our products and possible services by researching market conditions in local, regional, and national areas. The petitioner stated that the beneficiary qualifies for the proposed position based on his education, work experience, language skills, and knowledge of the industry.

The director found that the proposed position resembles a sales manager as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reveals that a bachelor's degree in a specific specialty is not required for this occupation.

On appeal, counsel states that the proffered position is not that of a sales manager; it is an import director. Counsel asserts that the occupations of sales manager and import director are specialty occupations according to CIS, California's Employment Development Department (EDD), the *Handbook*, and the *Occupational Information Network (O\*Net)*. Counsel maintains that CIS already determined that the proposed position qualifies as a specialty occupation as it previously approved an H-1B petition for a similar position. Counsel states that the proposed position requires special education and knowledge of the diamond business and trade and that these requirements are standard of this position. According to counsel, the foreign parent company, Alrosa Yakutia Diamonds, and the beneficiary's prior employer require a bachelor's degree for import directors. Counsel refers to the EDD, the *Dictionary of Occupational Titles (DOT)*, and a letter from Mr. S. David Dikinis to show that the proposed position is a specialty occupation. Counsel asserts that:

The fact that many associations related with the [s]ales [m]anagement profession offer certification programs based on education and job performance, supports our argument that the position of [s]ales [m]anager is a specialty occupation 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.

Counsel noted that CIS approved another petition that had been previously filed on behalf of the beneficiary. The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. If the previous nonimmigrant petition was approved based on the same assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Moreover, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

The prior approval does not preclude CIS from denying an extension of the original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5<sup>th</sup> Cir. 2004).

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

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.

Counsel's reference to and assertions about the relevance of information from *O\*Net* and the *DOT* are not persuasive in establishing that the proposed position qualifies as a specialty occupation. Neither the *DOT's* SVP rating nor a Job Zone category indicate whether a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of

vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require. Thus, counsel's reference to information from the EDD to establish that the proposed position is a specialty occupation is also not persuasive as the EDD refers to information in the *DOT*.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The proposed duties are a combination of those of a general and operations manager and a marketing manager as those occupations are described in the *Handbook*. The AAO recapitulates here the *Handbook* text about general and operations managers:

*General and operations managers* plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

The *Handbook's* information about the educational requirements of this occupation is as follows:

The formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts. . . .

Based on the above *Handbook* passage, a general and operations manager is not required to possess a bachelor's degree in a specific specialty as many top executives hold a bachelor's degree in business administration or the liberal arts.

The *Handbook* describes a marketing manager as follows:

*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.

The *Handbook* reveals that employers do not *require* a bachelor's degree in a *specific specialty* for marketing managers. The *Handbook* states:

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

Counsel asserts that the proposed position requires special education and knowledge of the diamond business and trade and that these requirements are standard for this position. The letter from Mr. [REDACTED] states that the proposed position requires at least a business degree; knowledge of diamond cutting: Russian TU-2001 cutting requirements; [REDACTED] "ideal cut," and the American Gem Society 000 (triple zero) "Ideal Cut"; knowledge of the Russian Export Trade Procedures and Legislation; and working knowledge of the Russian, English, and Sakha languages.

The AAO observes that under the job classification of jewelers and precious stone and metal workers, the *Handbook* describes the occupation of gemologists; it states that this occupation studies the quality, characteristics, and value of gem stones; sells jewelry; and provides appraisal services. According to the *Handbook*, jewelers usually learn their trade in vocational or technical school, through distance-learning centers, or on the job; and institutes offer courses and programs in gemology and jewelry manufacturing and design, with programs covering identification and grading of diamonds and gem stones. Thus, a bachelor's degree in a specific specialty is not required to become knowledgeable about the diamond trade and industry and the various diamond cuts.

Although Mr. Dikinis states that Russian export procedures and legislation is complex, the evidence in the record does not establish this. The record contains a straightforward, standard contract for the sale of goods, in this case diamonds. The proposed duties involve transporting imports through overseas company representatives; formulating import/export policies; planning the use of materials and human resources in the company's import operations; and coordinating the transport of diamonds. The *Handbook* suggests that baccalaureate level knowledge is not required for these duties. The *Handbook* relays that "[c]argo and freight agents arrange for and track incoming and outgoing cargo and freight shipments in airline, train, or trucking terminals or on shipping docks." They move shipments by determining their route; by preparing all necessary shipping documents; by determining the shipping rates; and for imported or exported freight, by verifying the proper customs paperwork.

The letter from the Ministry of Foreign Relations and the two from Georgetown University are not persuasive in establishing that the proposed position is a specialty occupation as they do not discuss the educational requirements of the proposed position. The Ministry of Foreign Relations' letter and one of the Georgetown

University letters discuss the beneficiary's qualifications and how it will enhance his prior employer; the second Georgetown University letter discusses the beneficiary's participation in a fellows program, and the AAO notes that the record contains only the first page of this letter.

Counsel also asserts that many associations involved with sales managerial positions offer certification programs based on education and job performance, demonstrating that a sales manager is a specialty occupation position. We have already addressed in this decision that the proposed duties are encompassed within those of general and operations managers and marketing managers, which are occupations that the *Handbook* reveals do not require a bachelor's degree in a specific specialty. In addition, the *Handbook* discloses that employers do not require a bachelor's degree in a specific specialty for sales managers; furthermore, whether or not an association requires certification is irrelevant in establishing that a position requires a bachelor's degree in a specific specialty. No evidence indicates that the diamond industry's professional association has made a degree a minimum entry requirement for the proposed position.

The AAO's conclusion, from the various evidence to which it has referred, is that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which is that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel references submitted job postings and also states that the beneficiary's prior employer normally requires a bachelor's degree for an import director. This evidence is not convincing. Only four of the eleven postings require a bachelor's degree in a specific specialty; of these, none of the employers are similar in nature to the petitioner, a subsidiary of a diamond manufacturer. [REDACTED] is not described in the posting; Spiegel is a catalog company selling many different kinds of products; CALTECH/JPL is in the aerospace industry; and California Wooden Furniture, Inc. sells furniture. The job posting from the beneficiary's prior employer indicates that it does not require a bachelor's degree *in a specific specialty* for an import director. For these reasons, the petitioner fails to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree. As discussed earlier in this decision, the proposed duties resemble those of general and operations managers and marketing managers, which are occupations that the *Handbook* reveals do not require a baccalaureate degree. In this decision, we have discussed that a baccalaureate degree is not required in order to have in-dept knowledge of gemology; and that a person need not have a baccalaureate degree in a specific specialty in order to perform the duties that are required to import and transport diamonds. Thus, the proposed position is not so complex or unique that it can be performed only by a person with a degree in a specific specialty.

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. According to counsel, the foreign parent company of the

petitioning entity requires a bachelor's degree for import directors. However, no evidence in the record shows that the foreign parent company requires a baccalaureate degree in a specific specialty for an import director. The statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific 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. In this decision the AAO has already conveyed that the proposed duties resemble those of general and operations managers and marketing managers, a baccalaureate degree is not required for a person to have in-dept knowledge of gemology, and a baccalaureate degree in a specific specialty is not necessary for performing the duties relating to the import and transport of diamonds. Accordingly, the petitioner fails to establish this last 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 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.