U.S. Department of Homeland Security
20 Mass Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: EAC 06 137 50152 Office: VERMONT SERVICE CENTER Date: DEC 13 2007

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

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, Chief
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 diamond merchant wholesaler that seeks to employ the beneficiary as an international diamond sales representative. 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.

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

The issue before the AAO is whether the 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) consistently 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 seeks the beneficiary's services as an international diamond sales representative. Evidence of the beneficiary's duties includes: the petitioner's April 3, 2006 letter in support of the petition and the petitioner's May 9, 2006 response to the director's request for evidence. As stated by the petitioner, the proposed duties, in addition to account development and sales, and diamond procurement, are as follows:

1. Identify product opportunities and work with Product Development to secure market-specific sales growth;

2. Work with marketing and distribution departments to secure materials for markets in appropriate languages;

3. Work with operations and customer service to ensure unique international requirements are met, establishing guidelines and policies to better serve international trade partners;

4. Grow sales of HOF products with existing distribution partners and develop new distribution in targeted markets;

5. Develop customized strategies for HOF branded products and services;

6. Work with existing international and customer service organizations to improve operational processes and improve profitability;

7. Identify key international trade shows and distributors for participation/distribution growth;

8. Coordinate international sales efforts with corporate HOF team; and

9. Manage monthly sales forecasting, shipping requirements and profitability reports, as well as budget annual expense and sales growth figures.

The director found that the proposed marketing and sales duties do not require a bachelor's degree in a specific field of study. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position qualifies as a specialty occupation, as it requires a bachelor's degree in international business, marketing, or a related field, in combination with diamond expertise. Counsel also states that the qualitative and quantitative research skills required for the analysis of the world diamond market activities and trends are sufficiently complex as to require a bachelor's degree. According to counsel, the petitioner has satisfied at least three criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states further that the proffered position is also similar to the positions of management analyst and management consultant, as the beneficiary will be responsible for providing sales management consulting to the petitioner's sales management in order to develop sales programs for diamond sales in Europe.

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 turns first 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; 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 Department of Labor's (DOL) *Occupational Outlook Handbook* (*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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position, which combines the duties of a marketing manager/sales representative and a market research analyst, is a specialty occupation. No evidence in the *Handbook*, 2006-07 edition, under the category of Advertising, Marketing, Promotions, Public

Relations, and Sales Managers, indicates that a baccalaureate or higher degree in a specific specialty is required for a sales manager position. A wide range of educational backgrounds is suitable for entry into sales manager jobs, but many employers prefer individuals with related experience and a broad liberal arts background. Nor does a review of the Sales Representatives, Wholesale and Manufacturing, or the Market and Survey Researchers categories in the *Handbook*, 2006-07 edition, find any evidence indicating that a baccalaureate or higher degree, or its equivalent, in a specific specialty is required for a sales representative job or a market research analyst position.[1] Furthermore, although counsel asserts on appeal that the proposed duties entail working with the marketing and distribution departments and with operations and customer service, as well as developing strategies for the petitioner's regional sales management, the record does not contain any evidence that the petitioner has such departments or employees. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Nor does the record contain any evidence in support of the petitioner's claims on the petition that it has 80 employees and a net annual income of $1 million, such as quarterly wage reports and federal income tax returns. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the 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, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(*1*).

Regarding parallel positions in the petitioner's industry, the record contains Internet job postings for international sales positions. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. The video game, building products, export management, theme park, and educational businesses are not similar to the petitioner's diamond merchant wholesaler business. Moreover, as the record contains unsupported claims regarding the basic information of the petitioner's business, the duties listed in the advertisements may not be established as parallel to those outlined by the petitioner. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

The record does not include any evidence from firms, individuals, or professional associations regarding an industry standard. In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*) – the employer normally requires a degree or its equivalent for the position. Counsel states on appeal that the petitioner has consistently

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[1] A review of the website of Marketing Research Association (MRA) at http://www.mra-net.org/edevents/cguide2.cfm finds that a wide variety of degrees are acceptable for entry into the industry including liberal arts, social science, and communications.

represented that two of its employees with whom the beneficiary will work have degrees in international business and backgrounds in international business. The AAO usually reviews the petitioner's past employment practices as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas to aid in determining the third criterion. Although the petitioner indicates it was established in 1996 and has 80 employees, the record does not contain any evidence that the petitioner previously employed anyone in the proffered position. Nor does the record contain an organizational chart to clarify the division of duties of the petitioner's 80 employees. In view of the foregoing, the evidence of record does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*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.

Counsel states, on appeal, that the proffered position is a combination of many different positions and thus the diversity of duties clearly serve as evidence of the position's inherent complexity. The petitioner, however, has not established that they exceed in scope, specialization, or complexity those duties usually performed by marketing managers/sales representatives and market research analysts, occupational categories that do not require a baccalaureate or higher degree in a specific specialty. Further, as indicated earlier in this decision, the petitioner's unsupported claims regarding the basic information of its business do not establish a requirement for the level of knowledge requisite for this criterion. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation.

Beyond the decision of the director, the petitioner has not established the beneficiary is eligible to perform the duties of a specialty occupation. The petitioner has provided an evaluation from a university professor based on both the beneficiary's foreign degree and his work experience, concluding that the beneficiary holds the U.S. equivalent of a Bachelor of Arts degree in international business. The record, however, does not contain any evidence that the evaluator is 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, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(*1*). Thus, the record fails to demonstrate that the beneficiary holds the equivalent of a baccalaureate degree in a field directly related to the proffered position. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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