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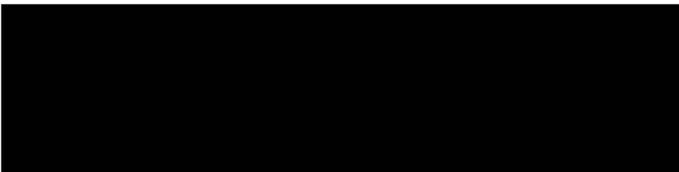
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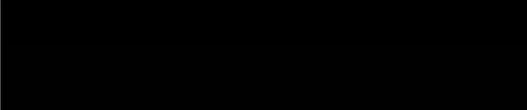
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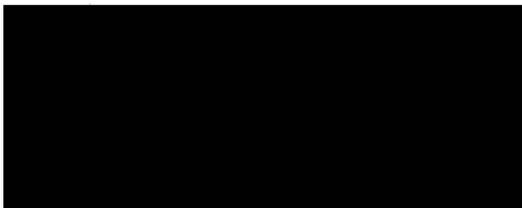


FILE: WAC 07 031 52048 Office: CALIFORNIA SERVICE CENTER Date: **AUG 0**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 jewelry manufacturer¹ that seeks to extend its authorization to employ the beneficiary as a market research 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 and the petitioner had not complied with the terms and conditions of employment.

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) counsel's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

The first 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 The Form I-129 petition identifies the petitioner as a jewelry manufacturer. On appeal, the petitioner indicates that it is a jewelry manufacturer and retailer in that it sells custom designed jewelry.

- (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 petitioner seeks the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the petitioner’s October 10, 2006 letter in support of the petition and counsel’s April 13, 2007 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

1. Study statistics, assess and evaluate supply/demand needs by prior review and current sales trends, and forecast future trends;
2. Plan, develop and implement marketing goals and formulate innovative, aggressive sales methods;
3. Research and analyze potential and existing client markets in the United States to target new markets and new customers, or to enhance existing customers;
4. Meet with customers, review sales invoices or negotiate more complex sales agreements, directly advise dealers on how best to achieve their manufacturing needs, formulate or negotiate sales prices utilizing knowledge of products, and coordinate sales distribution;

5. Formulate sales projections attempting to promote the quantity, quality, and price projections of the petitioner's products, and meet with staff to discuss the implementation of new marketing goals and to review customer projections; and
6. Coordinate sales distribution by establishing sales territories and goals, and advise sales dealers, distributors, and clients about the business operations, analyzing products, sales, and methods of marketing and distribution.

The director found that the proffered position is primarily that of a marketing manager. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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 is that of a market research analyst for the petitioner, which is a jewelry manufacturer and retailer. Counsel also states that the proffered position clearly meets all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel also states that the job description is consistent with the duties of a specialty occupation, as outlined in the *Handbook* and the *Dictionary of Occupational Titles (DOT)*. As supporting documentation, counsel submits: the petitioner's job description for the proffered position; excerpts from the *DOT* and the *Handbook*; a comparison chart referencing the proposed duties of the proffered position and the duties of the *DOT's* Market Research Analyst I position; copies of job advertisements; an affidavit from the petitioner's president; an industry letter; the petitioner's federal tax returns for 2003, 2004, and 2005; the petitioner's quarterly wage reports for 2005 and 2006; the petitioner's business licenses; the beneficiary's pay stubs; and the beneficiary's income tax returns for 2005 and 2006.

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 *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 acknowledges counsel's statement that the job description is consistent with the duties of a specialty occupation, as outlined in the DOL's *DOT*. Counsel's reference to and assertions about the relevance of information from the *DOT*, however, are not persuasive. The *DOT's* SVP rating does not

indicate that 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 is meant to indicate only the total number of years of vocational preparation required for a particular position. The classification does not describe 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.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. While a review of the Market and Survey Researchers category in the 2008-09 *Handbook* finds that market research analysts are employed throughout the economy, the AAO does not concur with counsel that the proffered position is a specialty occupation, as the *Handbook* does not indicate that a bachelor's degree in a specific specialty is required for a market research analyst position.² While the *Handbook* indicates that a degree is generally required, it indicates that a wide variety of courses will prepare a person to perform the duties of a market research analyst. The petitioner did not provide a description of duties in a market research analyst-related field that would require a master's degree, as described in the *Handbook*. Moreover, the samples of the beneficiary's work submitted on appeal, including the advertisement in the 2007 St. Thomas Shopping Guide and the advertisement campaign layout for the 2007 St. Thomas tourist guide magazines, indicate that much of the beneficiary's work is related to advertising and/or marketing. No evidence in the *Handbook* finds that a bachelor's degree in a specific specialty is required for advertising and marketing manager jobs. The petitioner submits a sample of the beneficiary's work as a market research analyst, "Casa Blanca's Market Research Overview report." This report is insufficiently identified as the beneficiary's work product and will not be accepted.³ Accordingly, the petitioner has not established the proffered position as a specialty occupation under 8 C.F.R. § 214.2(h)(iii)(A)(1).

The AAO acknowledges the undated certification from the president of another jewelry business in St. Thomas, VI, who certifies that he currently employs two market research analysts at his business, and that the job position of market research analyst usually requires at least a four-year degree in the field of business or marketing. The writer, however, does not provide any evidence in support of his assertions or rely on industry surveys, data or other documentation to reach the conclusion that the position requires a bachelor's degree in

² An Internet search on July 11, 2008 at the website of Gadball.com at <http://www.gadball.com/jobs/> finds the petitioner's job announcement for a market research analyst stipulating the requirement of four years of experience in marketing. The petitioner's job announcement does not stipulate any degree requirement.

³ The samples of the beneficiary's work that are market research related, including the market research overview, are actually excerpts from the publication, *Consumer Behavior Report Jewelry and Watches Shopping Trends V9. 2/07*. See the internet address: https://mr.pricegrabber.com/2007_Jewelry_and_Watches_Trend_Report.pdf. The record contains no explanation for these inconsistencies. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591.

a field related to business or marketing. 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)). The *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, and indicates that there is no specific degree requirement for entry into the field. The AAO may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Regarding parallel positions in the petitioner's industry, counsel submits Internet job postings for market research analysts. The listings provided either fail to offer meaningful descriptions of the positions advertised or rely on duties unlike the duties listed by the petitioner. In addition, the laboratory, wireless, industrial products, and manufacturing businesses in the advertisements are not similar to the petitioner's business. Neither do these listings indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Thus, the advertisements are insufficient to establish that a degree requirement is common to the industry in parallel positions among similar organizations. The record also does not include sufficient evidence from individuals, firms, or professional associations regarding an industry standard. Accordingly the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

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 as an advertising and/or marketing manager. Moreover, the evidence of record about the particular position that is the subject of this petition does not establish how aspects of the position, alone or in combination, make it so unique or complex that it can be performed only by a person with a degree in a specific specialty. 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. On appeal, counsel submits an affidavit from the petitioner's president who asserts: "When we recruit for this position we look for individuals with a Degree in order that they are able to perform the high-level responsibilities required in this position."⁴ The assertion of the petitioner's president is noted. The critical element, however, is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed

⁴ As noted above, the petitioner's online advertisement for the position of market research analyst requires four years work experience in marketing with no degree requirement.

employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

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 the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

On appeal, counsel asserts that the proposed duties, which entail: developing marketing strategies; managing the implementation of sales distribution; analyzing prices, sales, and methods of marketing and distribution; researching potential and existing client markets; and reporting directly to the petitioner's president, are so complex as to require a related bachelor's degree. As indicated in the discussion above, the record of proceeding contains unexplained inconsistencies and lacks evidence of specific duties that would establish such specialization and complexity. To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in a specific specialty. 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.

The director also found that the evidence of record contains discrepancies pertaining to the beneficiary's proffered wage and hours of work. As the petition will be denied because the position is not a specialty occupation, these issues will not be addressed.

In view of the foregoing, the petitioner has not overcome the director's objections. For these reasons, the petition may not be approved. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform a specialty occupation. The record contains a credentials evaluation from a company that specializes in evaluating academic credentials concluding that the beneficiary possesses the equivalent of a Bachelor of Business degree in marketing from an accredited institution in the United States. The evaluation, however, is based upon the beneficiary's formal education and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. The evaluator does not provide any evidence, such as a letter from a university provost, that he 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). CIS uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. Where an evaluation is not in accord

with previous equivalencies or is in any way questionable, it may be discounted or given less weight. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For this additional reason, the petition may not be approved.

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.