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U.S. Citizenship
and Immigration
Services

DQ

APR 05 2005

FILE: EAC 03 243 54207 Office: VERMONT SERVICE CENTER Date:

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:

[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.

Elizabeth Wiemann

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 diamond and jewelry wholesaler and retailer that seeks to employ the beneficiary as a marketing 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. On appeal, counsel submits a brief and additional evidence.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 representative. 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 performing market analysis and analyzing trends in the wholesale and retail diamond jewelry industry; overseeing scheduling and routing of newly arrived imported jewelry items and pieces; analyzing sales statistics and implementing sales plans; representing the petitioner in business events; preparing durational reports on sales and purchase figures; attracting new clients, and maintaining business relationships in the United States and Asia. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in business, business administration, marketing, or an equivalent, and have relevant work experience.

The director determined that the proffered position was not a specialty occupation. The director found the submitted letters from [REDACTED] unpersuasive, stating that the beneficiary's duties differ from those of the marketing managers described in the letters. Working in one of the professions, the director stated, does not automatically qualify a job as a specialty occupation, and that merely asserting that a position is a specialty occupation is not enough to establish that the industry normally requires a bachelor's degree. The director stated that the proffered position's title – marketing representative – is generally associated with specialty occupation positions, but the director found the job description and submitted evidence relating to the petitioner's business operations insufficient to demonstrate that the preponderance of the beneficiary's duties would be so complex that they would be professional in nature.

On appeal, counsel states that the proffered position is a specialty occupation, and refers to the opinion letters from [REDACTED] to demonstrate this. The letters from Tulgari Diamonds & [REDACTED] counsel states, were prepared with marketing managers in mind; however, this also means that a candidate for a marketing representative job in the jewelry service sector should also possess a bachelor's degree, particularly because the letters show that the petitioner competes with jewelry marketers that employ candidates possessing advanced degrees. Counsel emphasizes that although the petitioner is small, it still requires the services of a marketing representative to expand its business. Referring to various cases, counsel states that the courts have consistently determined that the size of a petitioner is irrelevant in determining whether a position qualifies as a specialty occupation. Counsel relays that the petitioner submitted a timely certified labor condition application along with the Form I-129 petition.

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 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* (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)).

On appeal, counsel refers to various cases to state that the courts have consistently determined that the size of a petitioner is irrelevant in determining whether a position qualifies as a specialty occupation. 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. Thus, in the analysis involving this case, the AAO did not consider the size of the petitioner's business operation.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. A review of the *Handbook* discloses that proffered position is analogous to marketing and sales managers. The *Handbook* reports:

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.

Sales managers direct the firm's sales program. They assign sales territories, set goals, and establish training programs for the sales representatives. . . . Managers advise the sales representatives on ways to improve their sales performance. . . . Sales managers maintain contact with dealers and distributors. They analyze sales statistics gathered by their staffs to determine sales potential and inventory requirements and monitor the preferences of customers. . . .

Many of the beneficiary's duties such as analyzing the market, trends, and sales statistics, representing the petitioner in business events, implementing sales plans, attracting new clients, preparing durational reports on

sales and purchase figures, and maintaining business relationships are encompassed within the *Handbook's* depiction of marketing and sales managers.

With respect to the educational requirements of marketing and sales managers, the *Handbook* explains:

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.

The *Handbook* reports that 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.

A "specialty occupation" is defined in the Act as an occupation that *requires* theoretical and practical application of a body of highly specialized knowledge, and the 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 *Handbook* reports that some employers *prefer* a bachelor's degree in a specific specialty for a marketing manager. These terms, "prefer" and "require," are not synonymous; they do not express a similar meaning. The *American Heritage Dictionary of the English Language* defines the term "prefer" as to select in preference to another or others; value more highly; like better, and "require" as to have use for as a necessity or need. Consequently, the petitioner fails to establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I) because the proposed position is similar to marketing and sales managers, occupations that do not *require* a specific bachelor's degree.

The opinion letter from [REDACTED]

[REDACTED] global [REDACTED] not persuasive in establishing that a specific degree requirement is common to the industry in parallel positions among similar organizations. [REDACTED] opines that it is a general, industry standard to hire a marketing representative with a bachelor's-level education and/or professional background in marketing or a related area. However, no documentary evidence substantiates this conclusion other than [REDACTED] experience as a professor of marketing, business, management, and related fields in the Lubin Graduate School of Business of Pace University in New York, his ownership of a consulting firm, and employment as an associate with All Types Advertising. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

As stated by the director, which the AAO concurs with, the letters from the jewelry companies do not indicate the duties of their positions; thus, it is nearly impossible to determine whether the proposed position is comparable. Furthermore, the AAO observes that although Gem Star, Inc. requires four years of college, the letter does not state that the degree must be in a specific specialty.

Based on the above analysis, the petitioner fails to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations.

No evidence in the record establishes that the proffered position is so complex or unique that it can be performed only by an individual with a degree. The *Handbook* reveals that the proffered position is comparable to marketing and sales managers, occupations that do not require a specific baccalaureate degree.

Because the proposed position is newly created, there is no 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 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. [REDACTED] in New York asserts that the proffered position's responsibilities are so complex and specialized that a candidate must possess at least a bachelor's degree in business administration and marketing. [REDACTED] draws his conclusion based on the academic positions he has held. No documentary evidence substantiates his conclusion, however. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

As already discussed, the duties of the proposed position resemble those of marketing and sales managers, which are occupations that the *Handbook* reveals do not require a bachelor's degree in a specific specialty.

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.

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.