

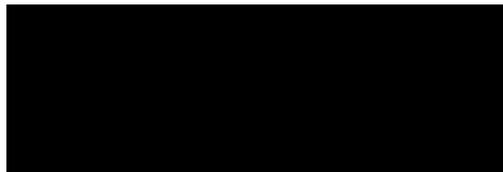
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC 06 150 53566 Office: VERMONT SERVICE CENTER Date: **NOV 28 2007**

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, Texas 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 imports, manufactures, and sells finished jewelry to retailers in the United States. On the Form I-129, the petitioner claimed to have 10 employees and a gross annual income of \$21,250,000 and a net annual income of \$236,000. It seeks to employ the beneficiary as an industrial production manager. Accordingly, it 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).

On December 8, 2006, the director denied the petition determining that the record did not establish that the beneficiary is qualified to perform services in a specialty occupation. On appeal, counsel for the petitioner asserts that the director's decision is in error and submits a brief.

The record contains: (1) the Form I-129 filed April 6, 2006 and supporting documentation; (2) the director's July 29, 2006 request for further evidence (RFE); (3) counsel's October 24, 2006 response to the director's RFE; (4) the director's December 8, 2006 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before rendering this decision.

The issue in this matter is whether the petitioner has established that the beneficiary is qualified to perform services in 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:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C) (i) experience in the specialty equivalent to the completion of such degree, and
(ii) 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, the 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.

At the time of filing the petition, the petitioner indicated that the position requires in-depth, specialized knowledge of both diamond and jewelry production and that the beneficiary met the petitioner's minimum requirements as "[h]e is uniquely qualified to fill this temporary position as his education and job experience equate to the American equivalent of a bachelor's degree."

The record does not evidence that the beneficiary holds a United States baccalaureate or higher degree as required to establish that the beneficiary is qualified pursuant to the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(C)(1). Neither does the record provide evidence that the beneficiary has obtained a foreign degree of any kind to meet the requirement at 8 C.F.R. § 214.2(h)(4)(iii)(C)(2). The record likewise does not include evidence that the beneficiary has a license, registration or certification; thus the petitioner may not establish the beneficiary's qualifications under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(3). Rather, the petitioner relies on the beneficiary's work experience and asserts that his work experience is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation. The petitioner does not directly address whether the beneficiary has recognition of his expertise, other than by the petitioner, in a specialty through progressively responsible positions directly related to the specialty pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for a H-1B nonimmigrant visa based on:

- (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;
- (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.

The petitioner initially submitted an October 21, 2005 evaluation of training and experience authored by [REDACTED] Professor, Department of Industrial Design, Auburn University. Although Professor [REDACTED] indicates that Auburn University considers granting college-level credit for courses based on a candidate's foreign educational credentials, training, and/or employment experience, neither Professor [REDACTED] nor the petitioner offer independent evidence, such as a letter from the dean or provost, that Auburn University has a program for granting such credit based on an individual's training and/or work experience.¹ The record contains no other evaluations of the beneficiary's work experience. Thus, Professor [REDACTED] opinion does not establish the beneficiary's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The record does not contain evidence that the beneficiary is qualified to perform the services for an H-1B specialty occupation based on the requirements at 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1), (2), (3), or (4). Instead the petitioner asserts that the beneficiary is qualified to perform the services of a specialty occupation because his progressively responsible work experience is equivalent to a baccalaureate degree which is evaluated under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). When considering the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), Citizenship and Immigration Services (CIS) must make the determination as to whether the beneficiary has acquired the equivalent of a degree through a combination of education, specialized training, and/or work experience in areas related to a specific specialty. In this matter the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation.

When evaluating a beneficiary's qualifications under the fifth criterion, CIS considers three years of specialized training and/or work experience to be the equivalent of one year of college-level training. In addition to documenting that the length of the beneficiary's training and/or work experience is the equivalent of four years of college-level training, the petitioner must also establish that the beneficiary's training and/or work experience has included the theoretical and practical application of the specialized knowledge required by the specialty occupation, and that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The record contains the following information regarding the beneficiary's foreign work experience:

A letter dated August 11, 2005 written by a partner, [REDACTED] in a diamond group. [REDACTED] [REDACTED] indicated that the beneficiary worked as a trainee from July 1991 to June 30, 1992

¹ In the July 29, 2006 RFE, the director specifically requested evidence that [REDACTED] had authority to grant college-level credit for training and/or work experience in the specialty and that Auburn University has a program for granting such credit based on an individual's training and/or work experience. The petitioner, however, provided no evidence in response to the director's specific request.

learning the processes of cutting and polishing rough diamonds into polished diamonds and assorting, grading, and evaluating both rough and polished diamonds. [REDACTED] indicated further that the beneficiary was employed from July 1993 to April 1995 as a full-time employee: assessing rough and finished diamonds; planning production to meet specifications of customers; ensuring adequate raw material in the pipeline so that production does not stall; studying and purchasing latest equipment; reviewing and studying stock levels of raw materials and finished goods; expediting production; and implementing quality control procedures. [REDACTED] indicated the beneficiary's title was that of operations manager when he left the company.

A letter dated August 10, 2005, written by [REDACTED] the director of a manufacturer and exporter of jewelry. The manufacturer's director indicated that the beneficiary had joined the organization as a junior executive in May 1995 and continued his employment to December 2001. The manufacturer's director indicated that the beneficiary, in his capacity as a junior executive, was in charge of production sourcing and planning, was made head of a department to improve efficiency, and when the beneficiary left the organization was holding the post of production manager. The manufacturer's director referenced the company's formal training programs and indicated the training programs involved design of jewelry, techniques for fabrication of jewelry, usage of modern tools and equipment, evaluation of diamonds/stones, model making, rubber moulds, casting of precious metals and setting of stones, and merchandising and cost control. The manufacturer's director indicated that the beneficiary had also been exposed to product development and marketing of jewelry. The manufacturer's director listed the areas in which the beneficiary worked including:

Planning of production schedules and reducing bottlenecks by proper streamlining of the workflow.

Monitoring levels of raw material requirements and setting reorder levels so that adequate materials are on hand without overstocking.

Setting up purchase procedures in order to reduce costs without any lowering of quality. Overseeing a quality control system and implementing high levels of standards in order to achieve a zero-rejection rate.

Study of latest production processes and the availability of new materials/alloys so as to keep updated with modern trends and practices.

Devising implementation and monitoring of employee incentive programs and welfare policy initiatives.

A letter dated August 5, 2005 written by a director of [REDACTED] [REDACTED] indicating that the beneficiary had worked as a production controller with the company from January 2002 to July 2005 at its contracted production facilities in China. [REDACTED] director indicated that the beneficiary had set up training programs, devised incentive programs, set up inventory control methods, monitored quality control, had been a team leader in organizing and attending shows and exhibitions and in preparing promotional brochures and flyers, and had traveled to develop new markets for the company.

Upon review of these letters, [REDACTED] offered his opinion that the beneficiary had "completed twelve

years and one month of progressively responsible qualifying work experience and training in industrial design, metal crafts, jewelry, and related areas, characterized by increasingly advanced responsibility and complexity under the supervision of managers, and together with peers, at a bachelor's level of practical experience." Professor Bartlett repeated the duties outlined in the beneficiary's foreign employers' letters and concluded: "[the beneficiary] undertook increasingly responsible positions of employment in the area of industrial design and jewelry design and production, characterized by the practical and theoretical application of concepts typically comprising the curriculum of a bachelor's-level program in industrial design, metal crafts, jewelry, and related areas."

The AAO does not find the information in the letters submitted by the beneficiary's prior employers sufficient to establish that the beneficiary's work experience included the theoretical and practical application of the specialized knowledge required by the specialty occupation or that the experience was gained while working with peers, supervisors, or subordinates who have degrees or the equivalent in the specialty occupation. The record does not contain evidence of the beneficiary's peers, supervisors, or subordinates while working for these prior employers or whether these individuals held degrees or specialized knowledge at a bachelor's or higher degree level associated with a specialty occupation in the business. The letters fail to discuss how the beneficiary's work experience with his peers, supervisors, or subordinates comprised an atmosphere conducive to obtaining knowledge that consequentially progressed to the equivalent of a bachelor's degree or its equivalent in the field.

The AAO also finds the descriptions of the beneficiary's duties while working for the prior employers insufficient to demonstrate that the beneficiary's work experience included the theoretical and practical application of the specialized knowledge required of an individual who through study has attained a bachelor's degree in a specific discipline. Although the letters suggest that the beneficiary gained experience and greater responsibility as he continued working for these concerns and transferred to other businesses, the letters do not describe daily duties that incorporate the theoretical and practical application of specialized knowledge attained through a four-year course of study at the university-level. The AAO acknowledges that the beneficiary's work experience resulted in experience as a manager, however, the petitioner has not described how the beneficiary's prior positions as a "manager" is similar or equivalent to university coursework. Moreover, the AAO finds the description of the beneficiary's duties for his prior employers insufficient to establish that the duties included fundamental and theoretical concepts traditionally taught in a university setting. The information provided describes general managerial and supervisory duties and duties resulting in technical skill, but does not convey an understanding of how these duties correspond to particular coursework at the university level. The record lacks evidence that demonstrates that the beneficiary has attained the equivalent of a bachelor's degree in education through a combination of his training and work experience. The petitioner has not established the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). For this reason, the AAO determines that the petitioner has not established that the beneficiary is qualified to perform the duties of the specialty occupation.

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) requires that the petitioner document recognition of the beneficiary's expertise in the specialty, as evidenced by one of the following: recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation; membership in a recognized foreign or U.S. association or society in the specialty occupation; published material by or about the alien in professional publications, trade journals, books or major newspapers; licensure or registration to practice the specialty in a foreign country; or achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation. The AAO has considered the opinion of [REDACTED]

to determine whether his opinion might constitute recognition of expertise in the specialty occupation by at least one of the two required recognized authorities.² [REDACTED] relies on the information submitted by the beneficiary's former employers as evidence that "[the beneficiary] undertook increasingly responsible positions of employment in the area of industrial design and jewelry design and production, characterized by the practical and theoretical application of concepts typically comprising the curriculum of a bachelor's-level program in industrial design, metal crafts, jewelry, and related areas." [REDACTED] however, does not support his conclusion with analysis of the beneficiary's work as it corresponds to particular university-level courses. Neither does [REDACTED] indicate he interviewed the beneficiary regarding his prior work experience or investigated the nature of the prior employers' companies and the beneficiary's role for the companies. [REDACTED] does not indicate whether the beneficiary's peers, supervisors, or managers had bachelor degrees in specific disciplines or otherwise support his conclusion that the beneficiary's "qualifying work experience and training in industrial design, metal crafts, jewelry, and related areas, [was] characterized by increasingly advanced responsibility and complexity under the supervision of managers, and together with peers, at a bachelor's level of practical experience." The AAO does not find [REDACTED] opinion is based on a factual foundation. Where an opinion is in any way questionable, the AAO may discount it or give it less weight. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The petitioner has not provided opinions from even one of the two required recognized authorities that establish the beneficiary's expertise in a specialty occupation. The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). For this additional reason, the petition will be denied.

Beyond the decision of the director, the petitioner has not established that the proffered position is a specialty occupation. The petitioner described the duties of the proffered position of industrial production manager by indicating:

[The beneficiary's] responsibilities will include managing production for [the petitioner] and production-related marketing for certain niche clients. His responsibilities include, matching technical requirements of each order with the capabilities and competence of the manufacturers and planning outsourced production accordingly, coordinating the raw material requirements with the manufacturers and order follow-up, ensuring quality standards during all stages of the jewelry manufacturing pipeline, and managing all manufacturer accounts. Further, [the beneficiary] will be responsible for establishing and monitoring quality control standards in the [the petitioner's] manufacture process, directing, and coordinating processing and distribution, and developing and implementing production tracking and quality control systems.

² *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 opinion, 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)(i)(C)(ii).

In addition, [the beneficiary's] responsibilities will include liaisoning one-on-one with select clients and assessing their requirements, working closely with designers to develop new concepts and products for these clients with respect to [the petitioner's] production capabilities and verifying the quality of [the petitioner's] material and final products.

To establish a position as a specialty occupation, 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.

CIS 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.

The general description provided by the petitioner corresponds generally to that of an industrial production manager. However, the Department of Labor *Occupational Outlook Handbook (Handbook)* notes that because of the diversity of manufacturing operations and job requirements, there is no standard preparation for the occupation of an industrial production manager. The *Handbook* notes further that some employers require a college degree, while other employers train promising apprentices or workers. The *Handbook* acknowledges that most employers would prefer a college degree, even for those who have worked their way up through the ranks. The *Handbook* also recognizes that the diversity of degrees that may be utilized in an industrial production managerial position includes: business administration, management, industrial technology, or industrial engineering, or even liberal arts. Thus, the *Handbook*, a source the AAO routinely consults for information about educational requirements, does not report that a degree in a specific discipline is normally the minimum requirement for entry into position of industrial production manager. Employer preference is not synonymous with the "normally required" language of the criterion. Moreover, when a job, like that of an industrial production manager, can be performed by a range of degrees or a degree of generalized title, without further specification, the position does not qualify as a specialty occupation. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). The petitioner has not established that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Turning to the second criterion, the petitioner in this matter has not provided any evidence to substantiate that a degree requirement is common to the industry in parallel positions among similar organizations. The record does not contain job announcements from similar organizations for jobs that are parallel to the proffered position; neither has the petitioner provided letters from professional associations or others in the industry that 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 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. The petitioner has not provided any documentation to distinguish the proffered position from similar but non-degreed employment. The record does not contain evidence establishing the proffered position is a specialty occupation pursuant to either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO acknowledges the petitioner's desire to employ an individual with experience in its industry. However, the petitioner's desire to employ someone with experience or who has a bachelor's degree does not establish that the position is a specialty occupation. The critical element 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 employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate degrees or higher degrees. The petitioner in this matter has not provided evidence that it has previously hired individuals with a bachelor's or higher degree or its equivalent to fill the position of industrial production manager. Accordingly, the AAO finds that the petitioner has not established the proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The AAO now turns to the fourth criterion and whether the petitioner has established that the duties of the proffered position are sufficiently specialized and complex to require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline. The description of the duties of the proffered position does not include complex or specialized elements that require knowledge usually associated with the attainment of a baccalaureate degree in a specific discipline. The petitioner has not provided documentary evidence that the duties of the proffered position contain complex or specialized duties different from that of a generalist position such as an industrial production manager as described in the *Handbook*. The record does not contain information that suggests the proffered position requires the performance of a combination of certain facets of varying occupations making this proffered position specialized. The record does not establish the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4).

The petitioner has not established that the proffered position is a specialty occupation. 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. 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. Accordingly, the director's decision will be affirmed.

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