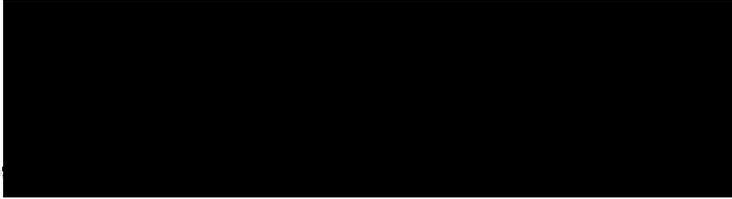




U.S. Citizenship
and Immigration
Services

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FILE: LIN 03 064 53354 Office: NEBRASKA SERVICE CENTER

Date: FEB 16 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 materials have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed the appeal. The matter is now before the AAO on a motion to reopen or reconsider. The motion will be dismissed as untimely. The AAO will reopen the proceeding on its own motion to consider the merits of the appeal. The appeal will be dismissed and the petition denied.

The petitioner operates an Italian restaurant. It seeks to employ the beneficiary as director of finance and administration and to classify him 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 on the ground that the proffered position is not a specialty occupation. On July 8, 2004 the AAO summarily dismissed the appeal on the ground that no supporting brief or evidence had been submitted, as counsel had promised within 30 days of the appeal, which was filed on August 6, 2003. Counsel submitted a motion to reopen or reconsider to the service center, dated July 15, 2004, along with a copy of an appeal brief dated August 29, 2003 and documentary evidence that it had in fact been delivered to the AAO on September 5, 2003 – *i.e.*, within the 30-day period indicated on the appeal form. The motion was initially returned to the petitioner because it was not accompanied by the required filing fee of \$110.00. By letter to the service center dated September 1, 2004 counsel stated it was now enclosing the filing fee, previously neglected because counsel did not think it was necessary for “correcting a Service error,” along with the motion to reopen or reconsider and accompanying materials. The motion was filed on September 2, 2004. Since 8 C.F.R. § 103.5(a)(1) provides that a motion to reopen or reconsider must be filed within 30 days of the decision and 8 C.F.R. § 103.5(a)(iii)(B) provides that the motion must be accompanied by the required filing fee, the motion will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4). The AAO has the discretion, however, to reopen a proceeding or reconsider a decision *sua sponte* under 8 C.F.R. § 103.5(a)(5). The AAO will exercise that discretion and treat the petitioner’s filing as a motion to reopen the proceeding under 8 C.F.R. § 103.5(a)(2). The appeal will be considered on the merits.

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.

As provided in 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 evidence (RFE); (3) the petitioner’s response to the RFE; (4) the notice of decision; and (5) Form I-290B, the appeal brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As described in a letter accompanying the petition in December 2002, the petitioner was established in January 2001 and its principal business is an Italian restaurant called [REDACTED]. According to the petitioner the restaurant had a gross annual income of \$1.2 million and 22 employees at the time of filing. The petitioner stated that it needed to hire the beneficiary as its director of finance and administration to assume responsibility for the business’s “financial planning, including payables, receivables, budgeting and projections,” as well as for the administration of the business, including personnel management. The beneficiary would oversee the work of an accountant, a bookkeeper and “captains/managers,” and would in turn report to the president. The proffered position required a baccalaureate degree in business or economics or its equivalent in education and work experience, according to the petitioner, which the beneficiary fulfilled with a combination of university study in Italy, including one and a half years of coursework in business economics, and twenty years of business experience in managerial positions. In response to the RFE requesting a more detailed job description, counsel submitted the following list of the job duties and percentage of time spent on each:

Daily:	Review receipts and expenditures	10%
	Staff supervision (staff meeting)	7%
Weekly:	Review and approve payroll/government reporting	8%
	Review and approve payables/receivables	8%
	Review and approve weekly financial reports	5%
	Planning meeting with ownership	5%
Monthly:	Review and approve monthly financial reports	5%
	Review and approve budgets	[2%]
Annually:	Prepare annual business plan and projections	5%

As needed:	Negotiate contracts with vendors and suppliers	10%
	Negotiate and maintain banking relations/credit lines	5%
	Recruit, interview, supervise training of employees	10%
	Prepare employee evaluations	5%
	Plan, secure and maintain employee benefits programs	5%
	Work on advertising and marketing plans	10%

The petition was denied by the Nebraska Service Center on the ground that the proffered position did satisfy any of the criteria of a specialty occupation enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director discounted a letter from the president of Moore Staffing Solutions, asserting that a bachelor's degree in business administration or business economics together with professional experience is required for entry into the proffered position, because the author had not established her credentials to offer an expert opinion. Nor was there any evidence in the record that the petitioner had previously filled the proffered position with degreed individuals. In the director's view, the duties of the position appeared to "combine the duties of a general manager or executive with those of a business manager," which comported with the Department of Labor (DOL)'s description of general managers and top executives in its *Occupational Outlook Handbook (Handbook)*. Such positions, according to the *Handbook*, did not require a baccalaureate or higher degree in a specific specialty.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

In his appeal brief, resubmitted with the motion to reopen, counsel asserts that the proffered position qualifies as a specialty occupation under at least one, and possibly three, of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel disagrees with the director's categorization of the position and asserts that the duties of the position fit the *Handbook* description of a financial manager. As described in the *Handbook*, 2002-03 edition, at page 52, financial managers "oversee the preparation of financial reports, direct investment activities, and implement cash management strategies." The *Handbook* indicates that the duties of financial managers vary somewhat depending on the nature and needs of the business. Counsel cites another excerpt from the *Handbook* pertaining to the controller functions of a financial manager: "Controllers direct the preparation of financial reports that summarize and forecast the organization's financial position, such as income statements, balance sheets, and analyses of future earnings or expenses." According to counsel the foregoing tasks quoted from the *Handbook* coincide with eight specific tasks of the petitioner's proffered position, previously listed, comprising a majority of the time on the job. Since the *Handbook* states that a bachelor's degree in finance, accounting, or a related field is the minimum academic requirement for financial management positions, counsel asserts

that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Counsel also submitted additional evidence of the credentials of the president of Moore Staffing Solutions and asserts that her letter now confirms that a baccalaureate degree in business or a related field is the normal minimum requirement to enter into the proffered position.

In deciding whether a position qualifies as a specialty occupation CIS looks beyond the title of the position and determines, based on the described duties and supporting documentation, whether the position requires the 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, to perform the duties of the job. Though the petitioner describes itself as a restaurant with 22 employees and \$1.2 million in gross annual income, there are no business records, tax returns, or other documents in the file supporting the petitioner's claim as to the nature and size of its operation. Simply going on record without supporting documentary evidence does not satisfy the petitioner's burden of proof. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190, 193-94 (Reg. Comm. 1972).

In his appeal brief counsel indicated that the petitioner was planning to open a second restaurant in Chicago, requiring a multimillion dollar investment and complex bank financing of the real estate acquisition and redevelopment, which would necessitate the services of a director of finance and administration. No details of this project have been provided by the petitioner, however, or any documentation pertaining thereto. The assertions of counsel, without more, are not persuasive evidence. *See INS v. Phinpathya*, 464 U.S. 183, 188-89, n. 6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without additional evidence as to the scope of the petitioner's business operations the duties of the proffered position may not add up to more than those of a bookkeeping or accounting clerk – positions which do not require a baccalaureate degree in a specific specialty and are not specialty occupations. The present record, therefore, does not establish that the petitioner's business is of such volume or complexity that it will employ the services of a financial manager.

The AAO concludes that the proffered position does not meet any of the regulatory criteria to qualify as a specialty occupation. Since the petitioner has not demonstrated that it will employ the services of a financial manager, the record does not establish that a baccalaureate or higher degree is the normal minimum requirement for entry into the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). By the same token, the petitioner has not shown that a degree requirement is common to the industry in parallel positions among similar organizations, as required to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor has the petitioner demonstrated that the proffered position is so complex or unique, or the duties thereof so specialized and complex, that an individual with a specialty degree or equivalent knowledge is required, as posited in the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Lastly, the position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – “The employer normally requires a degree or its equivalent for the position” – since the record indicates that the position is newly created and the petitioner has no hiring history for it.

Based on the evidence of record, it also appears questionable whether the beneficiary is qualified to perform the services of a specialty occupation. As provided in 8 C.F.R. § 214.2(h)(4)(iii)(C), the beneficiary 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.

The beneficiary clearly does not qualify to perform the services of a specialty occupation under the first three criteria listed above. As for the fourth criterion, the record indicates that the beneficiary took some courses in business economics at the University of Bologna which, according to a credentials evaluation report, are equivalent to one and a half years of undergraduate study at a U.S. university. This is the only university coursework which might be considered directly related to the specialty occupation of financial manager. The beneficiary claims to have twenty years of executive and management experience at three Italian companies, none of which is still in business. The record includes copies of commercial registry extracts indicating that all three companies were relatively small operations (under five employees) during the 1990s. The companies were involved in jewelry trading and knitwear production and retailing. Though the beneficiary appears to have been an owner and/or chief executive of the companies, the record contains little evidence of the precise nature of his work or that his duties were akin to those of a financial manager as described in the *Handbook*. It is questionable whether the beneficiary's combination of education and experience would be deemed equivalent to completion of a U.S. baccalaureate or higher degree in the specialty occupation of financial management.

The statute requires that the beneficiary be coming temporarily to the United States to perform services in a specialty occupation. See section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101 (a)(15)(H)(i)(b). The petitioner has not established that the beneficiary in this case will be performing services in a specialty occupation.

The petitioner bears the burden of proof in these proceedings. See section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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