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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536

File: LIN 01 147 54211 Office: VERMONT SERVICE CENTER Date:

AUG 20 2003

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:



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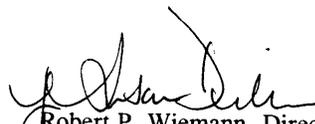
INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Illinois [REDACTED] and [REDACTED] store. It has five employees and a gross annual income of \$230,000. It seeks to temporarily employ the beneficiary as an operations manager for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, counsel asserts that the fact that the proffered position is a new one within the petitioner's business and the fact that the petitioner did not require an individual with a baccalaureate degree previously should not be used to deny the instant petition. The Bureau notes that, although counsel indicated that a brief and/or additional evidence would be submitted to the AAO within 30 days of filing the appeal, as of this date, the record does not contain any additional evidence. Therefore, the record is considered complete, and the AAO shall render a decision based upon the evidence before it at the present time.

Section 214(i)(1) of the Immigration and Nationality Act (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 field 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.

The issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Nebraska Service Center on April 4, 2001, the petitioner described the duties of the proffered position as follows:

Evaluate, plan, organize and recommend business policies and procedures[.]

Review financial documents prepared by staff accountant.

Oversee business operations and ensure business policies are properly implemented[.]

The petitioner identified itself as a motel, restaurant and store on the initial petition. A cover letter provided by the petitioner also described the petitioner as a [REDACTED] and [REDACTED] store licensed in the State of Illinois. The petitioner also stated:

As with any operations manager position, the usual minimum requirement for performance of the job duties is a bachelor's degree in accounting or finance, or in business administration. For a position at the level offered, it is not unusual for the incumbent to have some experience in business management and credit analysis.

On May 4, 2001, the director requested a certified Labor Condition Application, Form ETA 9035, (LCA) as well as further information with regard to whether the proffered position was a specialty occupation.

In response, the petitioner submitted a certified LCA. With regard to whether the position of operations manager was a specialty occupation, the petitioner submitted the following documents:

An excerpt on the general manager and hotel manager classifications in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*

Eight job vacancy announcements taken from the Internet for general manager positions throughout the United States

Request for Prevailing Wage Statement from the Illinois Department of Employment Security that identifies the proffered position as equivalent to a hotel manager, based on the DOT code of 187.117-038.

The description of the manager, hotel or motel category found in the Department of Labor's *Dictionary of Occupational Titles (DOT)*

Counsel stated that, under the statute, the proffered position does not require a bachelor's degree in a specialized area, as the Bureau suggested, in order to qualify the position as a specialty occupation. (Emphasis in original.)

On September 13, 2001, the director denied the petition and stated that the evidence submitted to the record did not show that the petitioner had ever required a degree in the past or currently requires a degree. The director also determined that the *DOT* classification did not provide sufficient weight to establish that the proffered position was a specialty occupation. The director also stated that the job vacancy announcements submitted by the petitioner did not provide sufficient weight to establish that parallel positions within the industry required a baccalaureate degree in a specific specialty.

On appeal, counsel states that the operations manager job is a new position within the petitioner's organization, and for this reason, the petitioner has not required a degree for previous employees. Counsel states that the Bureau's use of this argument to deny the petition is erroneous. Counsel also states that the beneficiary's tasks will be complex, and thus the position would require an individual with a baccalaureate degree majoring in management. Counsel provides no further documentation on the complexity of the proffered position.

Upon review of the record, the petitioner asserts that the proffered position is a specialty occupation because it has been assigned a specific code in the Department of Labor's *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991) and also the State of Illinois in its Wage Determination form assigned a DOT code to the proffered position. However, the *DOT* is not considered a persuasive source of information regarding whether a particular job 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.

The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. For the same reason, the fact that the State of Illinois assigned a specific *DOT* code to the proffered position in its Wage Determination document has no bearing on whether the proffered position is a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), a petitioner must establish that a baccalaureate or higher degree or its equivalent would be considered the minimum requirement for entry into the operations manager position. The Department of Labor's *Occupational Outlook Handbook, (Handbook) 2002-2003* edition, examines the position and educational requirements for operations managers under its classification of top executives. It is noted that the petitioner has referred to the *Handbook* classification of hotel and restaurant manager in its response to the director's request for further evidence; however, the petitioner has placed no information with regard to the petitioner's motel or restaurant business operation. As a result, this proceeding will not examine the *Handbook* classification of food or lodging manager.

On page 87, with regard to general and operations managers, the *Handbook* states:

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. The duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing or administrative services.

With regard to training, and other qualifications for the operations managers, the *Handbook* states on page 87:

The formal education and experience of top executives varies as widely as the nature of their responsibility. Many top executives have a bachelor's or higher degree in business administration or liberal arts.

. . . .

Since many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many are promoted from within the organization. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers.

Accordingly the *Handbook* indicates that the minimum educational requirement for entry into the operations manager position could be a bachelor's degree in business administration or liberal arts or less than a baccalaureate degree for persons who are experienced and have advanced through the company. Contrary to counsel's assertion, the Act establishes that the petitioner must show that the proffered position requires a baccalaureate degree or higher, or the equivalent, in a specific specialty. (Emphasis added.) To interpret the criteria in 8 C.F.R. § 214.2(h) (4)(iii) (A) as solely requiring a bachelor's degree in any field is an incorrect interpretation. 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ Without more persuasive testimony, the petitioner has not established the first criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the second criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A), namely that the degree requirement is common to the operations manager position, the petitioner submitted eight job vacancy announcements from the Internet for various manager positions. None of these announcements appear to be for parallel positions within the gas station, store, motel or restaurant management field. The job advertisements range from a manager of a wireless telecommunications company, to a retail showroom manager. The only commonality among these announcements is the use of the word manager in their job titles. In addition, the educational requirements listed in these job announcements do not establish that a bachelor's degree in a specific specialty is required for positions parallel to the proffered position. The majority of the vacancy announcements only state that a bachelor's degree is required.

With regard to the third criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A), namely that the employer normally requires a degree or its equivalent for the position requires a degree, on appeal, the petitioner established that the proffered position was a new position, and as such the petitioner had not hired anyone else previously in the position. Accordingly the petitioner did not establish the third criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the final criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A), namely that the nature of the specific duties is so

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2 (h) (4) (iii) (A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, the record is confused as to the exact nature of the work to be performed by the beneficiary. The petitioner presented two descriptions of its business activities. As stated previously, in the I-129 petition, the petitioner initially identified itself as a motel, restaurant and store. However, a cover letter provided by the petitioner along with the petition described the petitioner as a CITGO gas station and Mart 05 store. The petitioner has placed no further documentation on the record with regard to any restaurant, motel or gas station operation. The record as presently constituted is devoid of any documentary evidence as to the level or complexity of the business activities or operations the beneficiary would be performing. The petitioner has not clarified the inconsistent testimony provided in the original petition. Without more persuasive evidence, the petitioner has not established that the proffered position is either specialized or complex.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.