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U.S. Department of Justice
Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

File: LIN 01 263 52542 Office: NEBRASKA SERVICE CENTER Date:

JAN 06 2003

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)

IN BEHALF OF PETITIONER:

[Redacted]

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

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 Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a beauty and hair salon serving mostly the Korean community in the greater Chicago area. After ten months of operation, the petitioner has sales expectations of \$124,000 for 2001. The petition states that the petitioner has no employees. The petitioner seeks to temporarily employ the beneficiary as a hairdresser for a period of three years. The director determined that the petitioner had not established that the position offered to the beneficiary was a specialty occupation. He also determined that the petitioner did not have a valid Department of Labor ETA-9305 Labor Certification when the petition was filed.

On appeal, counsel submits the certified copy of the ETA-9305 and maintains that the actual position of the beneficiary, beauty salon manager, meets the criteria to qualify as a specialty occupation.

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.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The issue in this proceeding is whether the petitioner has established that the position offered to the beneficiary is a specialty occupation.

In the initial filing, the petitioner stated that the beneficiary would work as a hairdresser and the non-technical description of her duties was hairdresser for the mainly Korean community. In a cover letter, the petitioner described the following duties for the beneficiary:

Daily management of beauty salon

Consult and advise the clients' need of beauty care

Full responsibility on hiring of future makeup artist and other hair dresser

The petitioner further stated that for the proffered position, she usually requires an associate degree from a beauty school, and a minimum of one year of experience in hair dressing. The petitioner also stated that the applicant must be fluent in the Korean language. No ETA 9305 Labor Certification document was submitted with the petition. Counsel for the petitioner stated that the LCA had been submitted

On October 29, 2001, the director asked for further information with regard to how the proffered position met any of the four criteria for qualifying as a specialty occupation. The director also requested a complete, detailed description of the duties to be performed by the beneficiary. In addition the director also requested copies of any written contracts, any evidence to establish that the beneficiary holds an unrestricted State license which authorize her to fully practice as a hair dresser in Illinois, and an advisory evaluation of the beneficiary credentials in terms of equivalent education in the United States. The director stated that the evaluation should consider formal education only, state whether the applicant had completed the United States equivalent of high school before entering college, and briefly state the qualifications and experience of the evaluator providing the opinion.

On January 16, 2002, the petitioner described the proffered position as Beauty Salon Supervisor. The petitioner provided the following detailed description of the proffered position:

Responsibility for the routine operations of the salon including but not limited to arranging client appointments, coordinating staffing requirements incident to workload, cash management and inventory control (10 hours/week).

Supervision and training of staff in the areas of cosmetology, customer service and salon operations. Collaterally, ensuring certification to state guidelines is maintained regarding personnel training (8 hours/week).

Providing client consultation on various skin health and beauty issues and assuring specific needs are satisfied or the presentation of new styles and techniques advantageous to the client are brought to their attention (3 hours/week.)

Assisting in the design and placement of advertising to increase the client base in and outside the Korean-American community (3 hours/week).

Assisting staff with communication difficulties with Korean clients having limited ability with English language skills (3 hours/week as required).

Cutting and styling men, women and children's hair in accordance with the customer's desires to achieve the desired grooming standard (10 hours/week)

Providing make-up and facial treatments to clients and providing instruction on skin care and maintenance (7 hours/week).

According to the petitioner, the minimum requirement offered for this position is a bachelor of Applied Technology in Cosmetology and an Illinois License in Cosmetology or an Associate Degree in Cosmetology and four years experience as a hairdresser/makeup artist and an Illinois License in Cosmetology.

With regard to the educational and vocational qualifications of the beneficiary, the petitioner submitted a list of subjects covered in the Beautician course at the Lee Hang Sook Beauty School. Courses included beauty culture theory, hygiene, sterilization, public health, skin care, hair styling, hair treatment, massage, manicuring, and makeup. The highest number of course hours was in hair styling (400 hours) and hair treatment (350 hours). A copy of the petitioner's LCA was submitted with the additional information. The petitioner explained that the certified LCA had not been received yet, due to delays in obtaining the IDES Alien Wage Certification and delays caused by the holidays.

On February 4, 2002, the director denied the petition and stated that the evidence provided did not establish that the proffered position met one of the criteria enumerated in 8 C.F.R. §214.2(h)(4)(iii)(A). In particular, the director determined that the petitioner had not established that hairdressing was a specialty occupation. This determination was based on pertinent sections of the DOL Occupational Outlook Handbook (Handbook). The director also stated that the petitioner had not submitted a certified labor condition application with the original submission of the petition, or with the response to the request for additional evidence. The director cited to 8 C.F.R. Section 103.2(b)(12) in finding the petition could be denied where

evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the petition was filed.

On appeal, counsel submits the DOL ETA Form 9035 that was previously unavailable, and asks to perfect the petition via the appeal process. Counsel asserts that the beneficiary is performing in a specialty occupation as a manager of the beauty salon and not in the capacity of a hairdresser. Counsel further calls to the attention of the Service the fact that the beneficiary's profession is listed as occupational group code 187 on the approved labor certification. In addition, counsel asserts that the beneficiary's salary would also support this classification.

Counsel states that the beneficiary has met the requirement of a bachelor's degree through the equivalent of an associate degree, four years of experience in Korea, and several awards given to her that recognize her artistic ability and talent. Counsel cites to the Handbook in examining a classification that he maintains is analogous to the proffered position, namely, sales worker supervisor. Counsel then states that the salon employs only one hairdresser beyond the position proffered to the beneficiary, but that this fact must be considered upon review of the definition of sales worker supervisor.

In support of these assertions, counsel resubmits the beneficiary's proof of prior employment and the beneficiary's course list from the Lee Hang Sook Beauty School. No evaluation of the beneficiary's educational and work experience is submitted. No evidence of any awards given to the beneficiary is submitted with the appeal.

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.

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)).

With regard to the classification of the proffered position in the instant petition, counsel's reference to the sales worker supervisor classification in the Occupational Outlook Handbook does not appear appropriate. Based on the evidence provided to date, there is no evidence on the record that the petitioner has any other employees. Counsel's assertion in the appeal materials of one other employee is not supported on the record by any substantive employee documentation. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Without more compelling testimony it appears the beneficiary will be supervising no one in the petitioner's business. In addition, based on the detailed breakdown of duties provided by the petitioner, the beneficiary will be spending some 30 hours a week providing direct services to clients in the petitioner's beauty salon. The correct classification for the proffered position appears to be hairdresser or cosmetologist.

The Department of Labor's Occupational Outlook Handbook, (Handbook) 2002-2003 Edition, examines the occupations of Barbers, Cosmetologist, and Other Personal Appearance Workers on page 326. The Handbook states that barbers, cosmetologists, and most other personal appearance workers must be licensed, and goes on to state:

Qualifications for a license however, vary. Generally, a person must have graduated from a State-licensed barber or cosmetology school and be at least 16 years old. A few States require applicants to pass a physical examination. Some State require graduation from high school while other require as little as an eighth grade education. . . . Full-time programs in barbering and cosmetology usually last nine to twenty-four months, but training for manicurists and pedicurists, skin care specialists and electrologists requires significantly less time. . . .

Upon review of the record, the petitioner has not established any of the four criteria enumerated in 8 C.F.R. §214.2(h)(4)(iii)(A), with regard to the proffered position qualifying as a specialty occupation. There is no evidence on the record that the position offered to the beneficiary normally requires a baccalaureate

degree or higher or its equivalent as a minimum requirement for entry into the particular position. To date, the petitioner has provided no substantive documentation that the beneficiary has done any academic work on a collegiate level or that her work experience would be considered as equivalent to a baccalaureate. The record only reflects that the beneficiary attended a one-year program in a Korean beauty school.

With regard to the second and third criteria, namely that the degree requirement is common to the industry in parallel positions, and that the employer normally requires a degree or its equivalent for the proffered position, to date, the petitioner has submitted no evidence to establish either criteria. In addition, the Handbook classification of hairdresser provides no support for such an assertion.

With regard to the final criterion, namely that 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, without more compelling testimony, the petitioner has not established the specialized and complex nature of the duties to be performed by the beneficiary. The detailed breakdown of work responsibilities provided by the petitioner did not establish that these responsibilities were in any way specialized or complex.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations. This petition may not be approved.

With regard to the submission of the LCA document with the appeal, Notwithstanding the delays asserted by counsel, the record shows that the LCA was certified on January 18, 2002. Nevertheless counsel chose to submit it with appeal materials dated March 19, 2002. While some leeway can and is provided by the Service for the submission of documents due to legitimate delays, the submission of the LCA after the denial of the petition is not one of the circumstances in which reasonable delays are allowed.

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.