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

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

21 2003

File: WAC 01 199 54894 Office: California Service Center Date:

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:

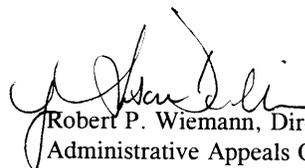
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 which 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 which 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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a California corporation operating automobile dealerships. It has 331 employees and a gross annual income of approximately \$120,925,000. The petitioner seeks to employ the beneficiary as a human resources assistant for a period of three years. The director determined that the petitioner failed to establish that the proffered position was a specialty occupation.

Counsel filed a brief in support of the appeal.

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), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Counsel asserts on appeal that the offered position is a specialty occupation. The Bureau does not simply rely on a position's title when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that the Bureau considers. The I-129 petition listed the beneficiary's job title as a human resources assistant who

would "assist payroll & H.R. manager." The beneficiary's job responsibilities were detailed as follows:

- Payroll processing and inquiries;
- Maintain employee files;
- Coordinate training program;
- New hire processing & assist in termination procedures; [and]
- Assist in overall functional duties of HR/Payroll Manager[.]

Subsequent to the filing of the petition, the director requested additional evidence in support of the petition. Specifically, the petitioner was asked to provide a detailed job description, evidence that the position qualified as a specialty occupation, copies of present and past job announcements for the offered position, and a copy of the petitioner's labor condition application. In response to that request, counsel stated that the beneficiary would be employed as a "Human Resource Specialist" and detailed the following job responsibilities;

- Assist in overall functional duties of HR/Payroll manager
- Recruitment and retention of staff, interviewing and selecting employees to fill vacant positions
- Organization, implementation and maintenance of benefits programs; occupational safety and health maintenance; occupational training programs; dispute relations;
- Review of employer-employee contracts;
- Planning and conducting new employee orientation to foster positive attitude towards company goals; delineation of position duties, establishment of clear performance benchmarks and monitoring of performance;
- Maintenance of records of personnel transactions, i.e. hires, promotions, transfers and terminations;
- Preparation of separation notices for employees separating with cause and conducting exit

interviews to determine reasons for separation;

- Determination of documents required by Federal and State laws and preparation and maintenance of all necessary documents relating to employment;
- Representation of company at personnel related hearings and investigations;
- Responsible for coordination of business office and all areas concerning payroll and payroll taxes;
- Responsible for directing any temporary clerical support;
- Act as liaison between management and employees to insure development and implementation of human resource records to improve productivity and limit job turnover;

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record.

The I-129 petition classified the proffered position as a "human resources assistant" and the labor condition application referenced that title as well. Indeed, the duties detailed at the time the petition was filed are indicative of a clerical or an assistant's position. The response to the request for evidence, however, significantly changes the duties of the proffered position as well as the title. Counsel seeks to qualify the beneficiary now as a human resources specialist or human resources manager. Neither counsel nor the petitioner may now change the title of the position or duties associated with it while the petition is pending.

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 petitioner has not met any of the above requirements to qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary, as set forth at the time the I-129 petition was filed, are similar to the duties that would be performed by human resources assistants and payroll clerks. In the *Occupational Outlook Handbook, 2002-03, (Handbook)* at 401-402, the Department Of Labor describes in part, the duties of human resource assistants:

Human resources assistants maintain the personnel records of an organization's employees. . . They answer telephone or letter inquiries from the public, send out announcements of job openings or job examinations, and issue application forms. . . . Some human resources assistants also are involved in hiring. They screen job applicants to obtain information such as education and work experience; administer aptitude, personality, and interest tests; explain the organization's employment policies and refer references from present or past employers. . .

The duties of payroll clerks are set forth in the *Handbook* at page 392:

Payroll clerks record changes in employee addresses; close out files when workers retire, resign, or transfer; and advise employees on income tax withholding and other mandatory deductions. They also issue and record adjustments to pay because of previous errors or retroactive increases. Payroll clerks need to follow changes in tax and deduction laws, so they are aware of the most recent revisions. . . . In offices that have automated timekeeping systems, payroll clerks perform more analysis of the data, look at trends and work with computer systems. They also spend more time answering

employee questions and processing unique data.

The duties assigned to the applicant in the I-129 petition appear to be clerical in nature: "payroll processing and inquiries, maintain employee files, coordinate training program, new hire processing & assist in termination procedures" The job was to assist the human resources and payroll manager. A high school diploma or its equivalent is the most common educational requirement for entry into this type of position. *Id.* at 394. A bachelor's degree is not, therefore, the minimum requirement for entry into the position. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Second, the petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. Third, the petitioner failed to present evidence to establish that parallel positions among similar organizations in the industry commonly require a bachelor's degree or its equivalent, or that the subject position is so complex or unique that it could be performed only by an individual with a degree. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree, or its equivalent.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

It should further be noted that the attorney who filed the I-129 petition submitted a notice of entry of appearance (G-28) indicating that he represented the beneficiary, [REDACTED]. The beneficiary of an I-129 petition is not a recognized party to the proceeding and accordingly is not entitled to representation in the process. 8 C.F.R. § 103.2 (a)(3). The I-129 petition may only be filed by the petitioner, or the petitioner's authorized representative.

The burden of proof in these proceedings rests solely with the petitioner, and the petitioner has failed to sustain that burden. Section 291 of the Act, 8 U.S.C. § 1361. The appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed.