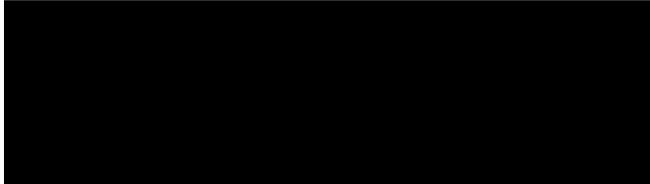


**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DA

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, NW
Washington, D.C. 20536



FILE: WAC 00 094 50369 Office: CALIFORNIA SERVICE CENTER

Date: NOV 25 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:



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 Citizenship and Immigration Services (CIS) 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
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a special effects and make-up novelties manufacturing business. It employs seven people and has a gross annual income of \$500,000. It seeks to extend its employment of the beneficiary as a systems management director for an additional three years. The director determined that the petitioner had not established that: (1) the beneficiary is qualified for the proffered position; and (2) the position is a specialty occupation.

On appeal, counsel asserts that the director erred in determining that the beneficiary is not qualified for the position, and that the director ignored the evidence and information provided. Counsel also states that the beneficiary has the equivalent of a baccalaureate degree. Additionally, counsel states that the position is a specialty occupation, and that this issue was not raised in the notice of intent to deny and, therefore, should not be used as the basis for a denial.

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.

A notice of intent to deny was issued to the petitioner rather than a request for evidence due to information that the director received from the consulate in the beneficiary's home country. The memorandum stated that the information provided with the first petition (which was approved, and under which the beneficiary has already worked for the petitioner for three years) contradicted information that the beneficiary provided in his personal interview for that visa.

The first issue to be considered in determining whether the beneficiary qualifies for the classification is whether he meets any of the criteria listed in 8 C.F.R. § 214.2(h)(4)(iii)(C).

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university.

The beneficiary does not hold a degree from a United States 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.

The beneficiary studied for two years in a post-secondary setting, but does not hold a foreign degree equivalent to a United States baccalaureate.

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.

This occupation does not require a State license, registration, or certification.

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.

This is the only criterion that the beneficiary could possibly meet. In considering whether the beneficiary qualifies under this category by virtue of his education, practical experience and/or specialized training, 8 C.F.R. § 214.2(h)(4)(iii)(D) states:

[E]quivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(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. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized

training and/or work experience must be demonstrated for each year of college level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Counsel asserts that the beneficiary has the equivalent of a baccalaureate degree, by virtue of his education and experience. He states:

The beneficiary also obtained two separate evaluations from independent credential evaluations organizations. Both the Foundation for International Services and the International Education Council studied and evaluated the beneficiary's educational and experiential background. *Both organizations concluded that the beneficiary had obtained an equivalency of a Bachelor Degree in a business field (business management or human*

resources management). . . . These expert opinions were also disregarded by the Service. (Emphasis in original).

It is noted that the Evaluation Report prepared by the Foundation for International Services, Inc. (FIS) and submitted with the initial filing of the petition does not meet the requirements of the regulations for determining equivalency. The Evaluation purports to determine that the beneficiary has the equivalent of a bachelor's degree in business management as a result of his employment experiences, and does not address the beneficiary's educational background. FIS is not qualified to prepare an evaluation of this sort as it does not: "[Have] 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," as required by the regulation. 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

In response to the director's notice of intent to deny, counsel submitted an additional assessment by [REDACTED] of the International Education Council (IEC). [REDACTED] determined that the beneficiary has the equivalent of a baccalaureate degree in human resources management with a concentration in employee training, based on a combination of his education and work experience. Again, reference is made to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Dr. [REDACTED] states that from 1978-1983 and from 1988-1993, he was responsible for granting college-level credit to students based on foreign education experience. The regulations state that the evaluation must be "from an official who has authority to grant" credit, not someone who has ever had that authority. (Emphasis added). Additionally, Dr. [REDACTED] states that he had authority to grant credit based on foreign education experience, not on foreign employment experience.

Even if Dr. [REDACTED] were qualified to make this assessment, having a degree in human resources management with a specialization in employee training would not establish the beneficiary's eligibility for this classification, as the degree equivalent would not be in the specialty occupation.

The International Education Council may be qualified to provide an evaluation of the beneficiary's foreign degree under 8 C.F.R. § 214.2(h)(4)(iii)(D)(3): "An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials." In the evaluation, Dr. Walther determined that the beneficiary's foreign education is

equivalent to one year of university-level studies. No documentation regarding the beneficiary's studies was submitted to Citizenship and Immigration Services (CIS), beyond a "Certificate in English Language," several forms stating that the beneficiary had passed exams in four subjects, and a brief explanation by the beneficiary. Dr. [REDACTED] refers to additional information not on record in making his assessment.

The petitioner has not demonstrated that the beneficiary's education and experience are equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), (2), (3) or (4). The only category under which the beneficiary could qualify would be 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), which allows CIS to make a determination that an equivalency exists.

It must be clearly demonstrated that the alien's training and/or work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country;
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

None of these elements beyond subpart (i) is relevant to the instant case, since no evidence has been put forth which could establish the beneficiary's qualifications under subparts (ii)-(v). Counsel submitted two letters in response to the notice

of intent to deny (in addition to the two evaluations, which have already been discussed). One additional letter was submitted with the initial petition, from [REDACTED] Franchise Operations Manager with Post Office Counters Ltd. The letter discusses the beneficiary's career track, and some of the responsibilities of each position. One letter submitted in the response to the notice of intent to deny was from Sheamus Stack, IT Manager, The Post Office, stating that the beneficiary performed at a senior manager level for four years, and that the letter from Harry James is a true report of the beneficiary's performance. The second letter submitted was from [REDACTED] previously with The Post Office, and now with Unisys. She stated that the beneficiary's resume and the letter from [REDACTED] are true and accurate.

The letter from [REDACTED] states that the beneficiary worked as a Branch Manager from 1983-1984, a position that required managing both people and funds. In 1984, the beneficiary moved into instruction and training, where he remained for five years. In 1989 until his retirement in 1993, the beneficiary developed and tested software as part of a small team on a prestigious project. In addition, he devised training courses and planned implementation of the training. The two additional letters confirm that this information is accurate, and Mr. [REDACTED] letter also states that the beneficiary:

[P]erformed at senior manager level during the testing and implementation of computer software and hardware for The Post Office from 1989 to 1993. . . . [The beneficiary's] contribution to the successful conclusion of the project was significant and in no small measure due to his varied managerial skills developed over many years at various levels of his career.

Pursuant to the regulations, the petitioner must present evidence that the beneficiary has recognition of expertise in the specialty by at least one of the forms of documentation referenced at 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i)-(v). Counsel did not submit any evidence to support the beneficiary's eligibility under this regulation other than the three letters, which are considered under 8 C.F.R. § 214.2(h)(4)(iii)(D)(5)(i). This standard requires "[r]ecognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation," and that "the alien's training and/or work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation." No information was submitted detailing the degree or equivalency information of those who wrote the letters or of those the

beneficiary worked for and with over the course of his career; therefore, the letters cannot be used to document the beneficiary's expertise.

Additionally, as referenced above, CIS is in possession of information from the consulate in the beneficiary's home country stating that the beneficiary provided information regarding his employment experience at the time of his interview that contradicted the characterization of that experience provided by the petitioner in the first petition filed and approved in approximately 1996. For the reasons stated above, the director's decision to deny the petition, in part, on this issue will not be disturbed.

The director also determined that the proffered position is not a specialty occupation because the position description is comprised of duties that "are general managerial duties and not those of a position requiring a particular set of professional skills to perform the stated duties." Counsel asserts that the position is, in fact, a specialty occupation, and that the Department of Labor's *Dictionary of Occupational Titles* (which the AAO notes is no longer in use) and the *Occupational Outlook Handbook* both support that a management analyst is a specialty occupation. Counsel also asserts that this issue was not raised in the notice of intent to deny. Because this issue was raised for the first time in the director's denial, the petitioner did not have adequate notice and opportunity to respond to the director's concern prior to the final adjudication. 8 C.F.R. § 103.2(b)(12). For this reason, the director's remarks on this issue are withdrawn.

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.