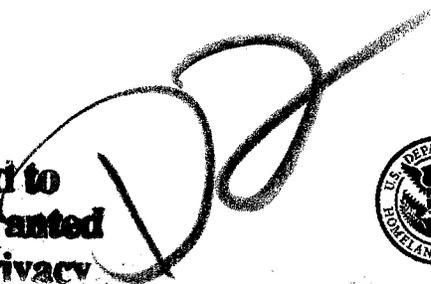


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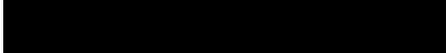
U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20536



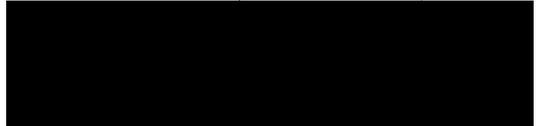
U.S. Citizenship  
and Immigration  
Services



FILE: LIN 02 126 54324 Office: NEBRASKA SERVICE CENTER Date **FEB 25 2004**

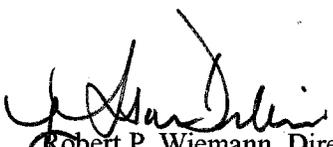
IN RE: Petitioner:   
Beneficiary: 

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 documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant corporation that seeks to employ the beneficiary as a business operations specialist. The petitioner endeavors to classify the beneficiary 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 because the proffered position is not a specialty occupation. On appeal, counsel submits a statement with supporting documents.

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.

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.

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 additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a business operations specialist. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's February 26, 2002 letter in support of the

petition; and the petitioner's April 29, 2002 response to the director's request for evidence. According to the February 26, 2002 letter, the beneficiary would perform duties that entail: preparing the payroll for 25 employees bi-weekly; summarizing and forecasting company business activity and financial position in areas of income, expenses and earnings based on past, present and expected operations; preparing purchase orders, accounts payable, inventory control, treasury, quality control, marketing and advertising; and preparing reports required by regulatory agencies. These duties were changed in the April 29, 2002 letter to include strategic planning to determine if expanded business activities will be economically feasible and cost effective and evaluating potential new business opportunities such as catering, delivery, and beer and wine sales.

CIS notes that the responsibilities included in the April 29, 2002 letter were not included in the initial job description. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. See 8 C.F.R. § 103.2(b)(12). A petitioner cannot materially change the associated job responsibilities of a proffered position in order to satisfy statutory or regulatory requirements. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Accordingly, the additional duties of strategic planning and evaluating new business opportunities cannot be considered part of the beneficiary's activities. The appeal will be adjudicated based on the original duties as stated in the February 26, 2002 letter, and submitted with the petition.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the proffered position is a specialty occupation, and that a letter from an expert supports this assertion. In addition, counsel states that the petitioner has hired a bookkeeper, in order to allow the beneficiary to focus on other tasks.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *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." See *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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. There is no specific entry for a business operations specialist, but elements of the proffered position are included in both the restaurant manager and bookkeeper listings. The *Handbook* indicates that a bachelor's degree is not a requirement for a restaurant manager. There is not a full entry for bookkeepers, but in reviewing the website for the American Institute of Professional Bookkeepers, an organization that certifies bookkeepers, there is no academic requirement for certification.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for business, financial, and cost analysts, marketing managers and controllers for restaurants. The petitioner is a company of two restaurants, with a total of 25 employees. The Internet listings were for national chain restaurants. On appeal, counsel states, "[t]he regulation does not require identical duties or identically operated companies, only similar organizations." While counsel is correct in stating that neither identical duties nor identically operated companies are required to make a comparison, he is incorrect in presuming that a company with two restaurants and 25 employees would be a similar organization to a national chain with hundreds of restaurants and thousands of employees. Thus, the advertisements have little relevance.

Counsel submits two letters from an accounting professor, which state that the duties of the proffered position (as spelled out in the petitioner's second letter of April 29, 2002) are normally associated with the acquisition of a bachelor's degree in business administration, finance, accounting or a related field. In her second letter, filed with the appeal, the professor states that the small size of the petitioner's company makes the degree requirement even more important as each employee is required to have broader responsibilities. She also notes that since the petitioner had hired a bookkeeper, thereby removing those responsibilities from the proffered position description, the beneficiary would be focused solely on higher level business functions. As discussed above, a petitioner must establish eligibility for the benefit it is seeking at the time the petition is filed and cannot materially change the associated job responsibilities of a proffered position in order to satisfy statutory or regulatory requirements. The fact that the petitioner hired a bookkeeper is irrelevant to this proceeding; the matter is being adjudicated based on the position description at the time the petition was filed. Other than the professor's letters and the Internet listings, no other evidence was submitted regarding hiring practices in the petitioner's industry, and no evidence is on record to corroborate the professor's statement.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The position is primarily a general management and bookkeeping position. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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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.

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