

U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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Washington, DC 20536



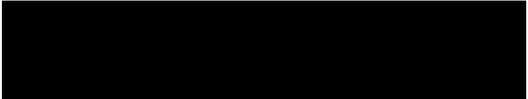
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JAN 13 2004
DATE:

FILE: SRC 03 028 50351

OFFICE: TEXAS SERVICE CENTER

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:



Identifying data deleted to
protect 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 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.

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Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a full service beauty salon that currently employs five persons and has a gross annual income of \$93,000. It seeks to employ the beneficiary as general manager for a period of three years. The director denied the petition for failing to establish that the proffered position was a specialty occupation.

On appeal, counsel submits a brief.

On the Form I-129, the petitioner listed the proffered position as "General Manager" and described the proposed duties as "Managing [the] daily operations of [a] full service beauty salon. Direct operations and implement policies."

Among other documents submitted with the Form I-129 were a letter of support from the petitioner's president, and an excerpt on the occupational title "General and Operations Managers" from the Department of Labor's (DOL) Employment and Training Administration's Online Wage Library.

The president's letter describes the petitioner as a full service salon that is located near "a high-end shopping center" in Miami Beach, Florida, and that caters to locals, tourists, and "snowbirds," offering "hair styling, highlights, cuts, color, flat iron, manicures, pedicures, acrylics, waxing, and facials." According to this letter, the petitioner's five employees include hairstylists, manicurists, and other beauty specialists. The letter provides this description of the proffered position:

As general manager of the hair salon, [the beneficiary] will direct and coordinate the day-to-day operations of the business. He will provide day-to-day oversight and supervise employees in order to ensure the business is run smoothly. He will also determine the amount of merchandise and beauty products to be stocked and sold by the salon. [He] will review inventory and sales records, develop merchandising techniques, coordinate sales promotions, and greet and assist customers in order to promote business and good public relations. The individual who holds this position must have the theoretical knowledge and ability to manage the salon without much supervision and possess strong customer service and public relations skills. This person must have the ability to effectively study the sales records and inventory levels of current stock to determine which products the store will sell and what products will appeal to the customers.

Along with "Area," "O*Net Code," "OES/SOC Code," and "Geographic Level" number references, the DOL Online Library excerpt includes this general description of the duties of general and operations managers, which illuminates nothing about specific types of degrees that may be required:

Plan, direct, or coordinate the operations of companies or public and private sector organizations. Duties and responsibilities 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 functional area of management or administration, such as personnel purchasing, or administrative services. Include owners and managers who head small business establishments whose duties are primarily managerial.

The director issued a request for additional evidence. She specifically requested evidence that the occupation of general manager is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A). The request also sought evidence regarding the type of degree that is the industry standard for general managers. The request also inquired as to who had held the general manager position in the past and what degrees such people held. The director also asked why the petitioner required a degree for the proffered position; whether the beneficiary is a licensed hairdresser; and whether the beneficiary would work on customers' hair. The director also requested the percentage of time that the beneficiary would devote to each of his duties.

Counsel responded with a letter which asserted that the nature of the proposed duties is so specialized and complex that they require knowledge usually associated with attainment of a degree:

The petitioner operates a full service beauty salon in Miami Beach, Florida. The Petitioner may be described as a small organization. Nonetheless, the business, like any other business, requires an individual who can manage the day to day operations of this business. These include, but are not limited to, day-today [sic] oversight of employees, formulation of policies and business strategies, and reviewing sales records and inventory. This individual must have the theoretical knowledge and ability to manage the business without a great deal of supervision. It is respectfully submitted that the occupation of general manager, as described above, is a specialty occupation because the nature of the specific duties are so specialized and complex that the knowledge required to perform these duties is usually associated with attainment of a degree. See 8 C.F.R. § 214.2(h)(4)(iii)(A). An

individual in this position must have the knowledge obtained after years of study in pursuit of a degree in business administration.

To support the proffered position as a specialty occupation, counsel's letter enclosed copies of two sections of the DOL *Occupational Outlook Handbook (Handbook)*. The letter refers to the *Handbook's* "General Managers and Top Executives" section for the statement "that general managers 'have a bachelor's degree or higher in liberal arts or business administration.'" The letter cites the "Retail Sales Worker Supervisors and Managers" section as stating "that most managers 'who have post-secondary education hold associate of [sic] bachelor's degrees in liberal arts, social science, business, or management."

For the proposition that "a degree in business is the industry standard," counsel referred to his *Handbook* enclosures and to the above paragraph excerpted from his letter.

Counsel's letter next indicated that the petitioner's owner performed the general manager duties in the past. Because of the growth in business and the petitioner's possible expansion to a second location, the owner "determined it would be necessary to hire an individual to handle the day-to-day oversight and management of the business." The letter provided no information about the owner's educational credentials.

According to the letter, the petitioner requires a degree in business administration because it "wants the [sic] person with a strong business administration background and considered a degree in business to be." The letter also stated that the beneficiary would not be working on people's hair and did not require a license.

Asserting that the beneficiary "will be assuming a new position within the petitioning company," counsel provided no information on the division of duties. Counsel stated, "Notwithstanding, it is respectfully submitted that one hundred percent of the Beneficiary's time will be spent on the managerial level."

The director's decision quoted at length from the *Handbook's* 2002-2003 edition sections on top executives and sales worker supervisors in reaching this ultimate determination:

The Service finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a general manager or as a sales worker supervisor. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in company training programs are often considered as significant as the beneficiary's specific educational background.

On appeal, counsel divides his brief into two separate "arguments": (1) on the proffered position as a specialty occupation, and (2) on the beneficiary's qualifications. This decision addresses only the first issue, as this is the one addressed in the director's denial of the petition.

Counsel asserts, in part, that the proffered position "is a specialty occupation because the nature of the specific duties are so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a degree." Counsel states that a person working in the proffered position "must have the knowledge obtained after years of study in pursuit of a degree in business administration." Counsel submits this assertion as "additional proof that the position requires an individual with a certain aptitude and specialized knowledge such as the one possessed by college graduates or people with many years of experience in industry." Counsel submits this perspective on the proposed duties:

The nature of the specific duties of a general manager with [the petitioner] are [sic] specialized and complex and thus are best handled by an individual with a university degree or its equivalent. The duties of general manager include directing the day-to-[-]day operations of the beauty salon. The general manager is not involved in providing services to the customers, but rather in the management of the business. He is also responsible for the day-to-day oversight of employees, formulation of policies and business strategies, and reviewing sales records and inventory. The individual who holds this position must have the theoretical knowledge and ability to manage the salon without much supervision and possess strong public service and recreational skills. This person must have the ability to effectively study the sales records and inventory levels of current stock to determine which products the store will sell and what products will appeal to the customers.

While not questioning the accuracy of the director's excerpts from the *Handbook* regarding the educational requirements for managers, counsel asserts that the director "abused her authority" by denying the petition. Counsel contends that, regardless of the fact that some general manager positions may not require a baccalaureate degree, "[u]nder the totality of circumstances the Administrative Appeals Office should find that the position of general manager as described in this case requires and [sic] individual with a baccalaureate degree or its equivalent."

Section 214(i)(1) of the Immigration and Nationality 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:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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 AAO applied these evidentiary principles in its consideration of the record, and they should be regarded as incorporated into the discussion of each regulatory criterion.

1. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. As this burden never shifts, the petitioner is solely responsible for compiling a persuasive record.
2. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).
3. 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).

Before discussing the evidence of record, it is worth emphasizing this point which is critical to both the director's and the AAO's decisions in this proceeding: Citizenship and Immigration Services (CIS) consistently and correctly interprets "degree" in 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.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), specifies that a "specialty occupation" is one that requires not only the theoretical and practical application of a body of highly specialized knowledge, but also attainment of a bachelor's degree or higher, or the equivalent, in "the specific specialty." Thus, the required degree must be in a specific specialty that contains a body of highly specialized knowledge that is necessary for performance of the proffered position. The definition of specialty occupation in 8 C.F.R. § 214.2(h)(4)(ii) mirrors the Act by stating that the required degree must be in "a specific specialty." Thus, CIS correctly interprets "degree" in all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A) as one in a specific specialty that is directly related to the proffered position. This is a reasonable interpretation that is consistent with section 214(i)(1) of the Act. See *Tapis International v. INS*, 94 F. Supp. 2d 172, 175 (D. Mass. 2000).

As the following discussion will show, the evidence does not satisfy any of the H-1B specialty occupation criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

**I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.
-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1) .**

The AAO ascribed no evidentiary weight to the On Line Wage Library page, as it provided no information about specific degree

requirements for the proffered position.

The AAO routinely consults the *Handbook* for its information about particular occupations' duties and educational requirements. The 2002-2003 edition's sections on "Top Executives" (pages 86-89) and "Advertising, Marketing, Promotions, Public Relations, and Sales Managers," (pages 26-29) confirm the accuracy of the director's assessment to the effect that, in general, positions in management do not require a baccalaureate or higher in a specific specialty. The evidence of record does not indicate that the proffered position has any duties or responsibilities beyond those of the of the aforementioned managerial occupations.

As the evidence does not establish the proffered position as one that normally requires a bachelor's degree or higher, or the equivalent, in a specific specialty, the petitioner has not met the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position so complex or unique that it can be performed only by an individual with a degree.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

A. Degree requirement common to the industry.

Factors often considered by CIS when determining the industry standard 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." *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 record does not include any documentary evidence regarding an industry-wide minimum educational credential. Additionally, as discussed above, the *Handbook* does not indicate that the proffered position is one with an industry-wide requirement for a degree in a specific specialty. Counsel's reliance on the *Handbook* in the reply to the request for additional evidence was unfounded: it misses the critical point, to which this decision has earlier alluded, that the bachelor's degree or higher required for a specialty occupation must be in a specific specialty.

B. Degree necessitated by the complexity or uniqueness of the position.

The record fails to establish that the proffered position is either so complex or so unique that only an individual with a bachelor's degree in a specific specialty could perform it.

The record describes the proffered duties in terms too general to illuminate much about the specific tasks that they would involve. To the extent that they are enumerated and described in the record, however, they comprise a position that is neither especially complex nor unique. The record does not demonstrate that the position's duties could only be performed by a person with a degree in a specific specialty.

The director was correct in not granting the petition under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (3) .

The petitioner presented no evidence on this issue, claiming that the position has never before been offered.

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 214.2 (h) (4) (iii) (A) (4) .

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 bachelor's degree or higher in a specific specialty. 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 discussions above, the petitioner has failed to establish any one of the four specialty occupation criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A), and counsel's assertions are without merit. Accordingly, the AAO shall not disturb the director's denial of the petition.

Again, 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.