



U.S. Citizenship
and Immigration
Services

D-2

[Redacted]

FILE: LIN 03 048 51983 Office: NEBRASKA SERVICE CENTER Date: JUN 22 2004

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)

ON BEHALF OF PETITIONER:

[Redacted]

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
Robert P. Wiemann, Director
Administrative Appeals Office

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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 that seeks to employ the beneficiary as a marketing manager. 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 brief.

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 marketing manager. The sole description of the beneficiary's duties is in a cover letter submitted with the petition and a response to the director's request for evidence (which repeated the information previously submitted), both prepared by an attorney. However, the Form G-28, Notice of Entry of Appearance as Attorney or Representative, was not properly executed since the petitioner did not sign it. "Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted." 8 C.F.R. § 103.2(a)(3). Since the only evidence regarding the position description was submitted by an unauthorized party, the director could not determine the actual duties of the position; instead, he considered the duties typically associated with the proffered position.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel provides a position description and states that the evidence previously submitted should have established that the position met one of the criterion cited in the regulations. Counsel submits evidence regarding the other criteria, since the first evidence was not accepted.

The director requested that the petitioner submit evidence to establish that the proffered position is a specialty occupation. The petitioner chose to provide evidence regarding only one of the criteria. On appeal, counsel now submits information regarding the other criteria. 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). The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

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. A review of the Marketing Manager job description in the *Handbook* confirms the director's assessment that no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty is required for this job. A wide range of specialties is appropriate for this position, according to the *Handbook*. Despite counsel's assertions that the regulations do not require that a degree be in a specific specialty, the regulations do, in fact, define "specialty occupation" to be one "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." (Emphasis added). 8 C.F.R. § 214.2(h)(4)(ii). The Act has similar language. Counsel also states that the director did not request that the petitioner meet the above standard in his request for evidence. This definition is incorporated into the regulatory requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A); it does not need to be discussed separately when requesting additional evidence.

Counsel provides evidence, much of which simply states that one normally needs a degree to be a marketing manager. CIS does not dispute this information, but reiterates that there is no requirement that the degree be in a specific specialty. Simply requiring a degree of any sort for entry into a field does not make an occupation a specialty occupation.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for marketing managers. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. In addition, four of the six postings submitted did not require a degree in a specific specialty. Thus, the advertisements have little relevance.

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.

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. 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.

Beyond the decision of the director, the AAO notes that the labor condition application filed in response to the director's request for evidence is dated December 2, 2002. The Form I-129 was filed on November 29, 2002. The regulations state, "Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed." 8 C.F.R. § 214.2(h)(4)(B)(1).

The petitioner obtained certification for the proffered position after the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The regulations require that the petition be denied due to the missing labor condition application. "An application or petition shall be denied where evidence submitted in response to a request for initial evidence does not establish filing eligibility at the time the application or petition was filed." 8 C.F.R. § 103.2(b)(12).

For this additional reason, the petition may not be approved.

The AAO also notes that counsel asserts on appeal that the petitioner "is one of the largest and most successful Fast Food Chains [sic] located in the U.S. for many years. It is a multi-million dollar company with international affiliations" that needs to have the beneficiary on its staff. To clarify the record, the information on the Form I-129 states that the petitioner has 35 employees and a gross annual income of \$200,000, which does not appear to describe the same company as that referenced by counsel. These discrepancies have not been resolved. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.