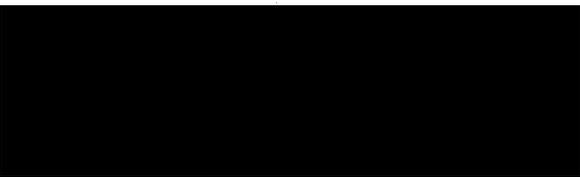




U.S. Citizenship
and Immigration
Services

D2



FILE: LIN 01 109 54634 Office: NEBRASKA SERVICE CENTER Date: SEP 02 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:

SELF-REPRESENTED

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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director of the Nebraska Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a television station (ABC) that seeks to employ the beneficiary as a TV newscast director. The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation. On motion, the petitioner submits additional and previously submitted evidence as well as a more detailed job description of the proffered position.

A motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must have been previously unavailable and could not have been discovered earlier in the proceedings. See 8 C.F.R. § 1003.23(b)(3). Here, the petitioner provides resumes of employees to support the claim that its normal practice is to hire only persons with a baccalaureate degree. Referring to industry surveys and reports and six opinion letters, the petitioner claims that a bachelor's degree is the normal entry-level requirement for a newscast director in the industry and with an organization like the petitioning entity. The resumes, studies, reports, and opinion letters were previously submitted by the petitioner. Needless to say, this evidence therefore does not constitute "new" facts.

Referring to the Department of Labor's (DOL) *Career Guide to Industries and the Occupational Information Network (O*Net)*, and the acinet.org and Illinois Department of Employment Security websites, the petitioner states that this additional evidence establishes that the proffered position requires a bachelor's degree in a specific specialty. This evidence, however, was previously available and could have been discovered earlier in the proceedings by the petitioner. For instance, the information from the *Career Guide to Industries, the O*Net*, and the two websites were easily available to the public from the Internet; as such, this evidence is not "new" for the purpose of a motion to reopen. The petitioner also submits the beneficiary's transcripts to demonstrate her qualifications. This is not "new" evidence because it could have been discovered earlier in the proceedings as they were part of the petitioner's hiring practices and therefore were previously available.

In addition, the director and the AAO had already considered the petitioner's claims about requiring a bachelor's degree in a specific specialty for the proffered position, about its hiring practices, and about entry-level degree requirements in the industry and with organizations similar to the petitioner.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Citizenship and Immigration Services (CIS) policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3).

On motion, the petitioner states that the director's denial of the petition, by requiring that it demonstrate a past practice of having a policy to hire *only* persons possessing a bachelor's degree in a specialty area directly related to the proffered position, was a higher standard to satisfy. In addition, the petitioner claims that the director did not permit it to establish one of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner states that the AAO's statement, that the proffered position resembled a broadcast and sound engineering technician, was inconsistent with the evidence. Moreover, the petitioner contends that, unlike the AAO, the

director did not question whether the proposed position was a weekend newscast director; instead, the director requested evidence in order to compare a newscast director position in a "large market" to one in a "small market." The petitioner claims that the AAO's statements about its hiring practices were inconsistent with the evidence as were its statements about comparable positions in the industry.

The petitioner fails to satisfy the requirements of a motion to reconsider. The petitioner claims that the director's decision to deny the petition was based on an incorrect application of the regulation as set forth at the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A); namely, that an employer must establish that it normally requires a degree or its equivalent for the proposed position. On appeal, the AAO properly addressed the petitioner's submitted evidence by stating:

[A]lthough the petitioner's past hiring practices indicate that it normally requires a baccalaureate degree in a television/media productions related field, the petitioner's reasoning is problematic when reviewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

Although the petitioner contends that the director did not permit it to establish one of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), the AAO's decision did carefully consider each of the four criteria.

The petitioner states that the AAO's decision was inconsistent with the evidence in the record, though it fails to define with any specificity how the AAO's decision was incorrect based on the evidence of record at the time of the initial decision. We have already discussed the AAO's determination about the petitioner's hiring practices. The AAO's conclusion, that the position resembled a broadcast and sound engineering technician, was based on the evidence in the record of proceeding. The AAO is not obligated to concur with the director's statements about the proffered position; it is never bound by a decision of a service center or district

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See id. at 387.

director. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The AAO notes that the petitioner's more detailed job description of the proffered position is a material change from the position as described in the initial petition. On motion, 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 offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 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.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated January 8, 2003, is affirmed. The petition is denied.