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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536

[redacted]

FILE: EAC 02 140 53526 OFFICE: VERMONT SERVICE CENTER DATE: JAN 27 2004

IN RE: Petitioner: [redacted]
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: [redacted]

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, Director
Administrative Appeals Office

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

The petitioner is an owner and operator of seven McDonald's franchises, employs a total of 300 persons, and has a gross annual income in excess of $11,000,000. It seeks to employ the beneficiary as an operations manager. The director denied the petition, having determined that the proffered position was not a specialty occupation.

On appeal, counsel submits a brief. Counsel maintains that the director erred in not considering certain evidence critical to the specialty occupation issue.

The issue for determination on appeal is whether evidence in the record establishes that the proffered position is a specialty occupation.

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), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

> an 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 petition in this case was filed on March 22, 2002, accompanied by a cover letter from the petitioner's attorney and several items of documentary evidence. The I-129 identified the proffered position as "operations manager." The documentary evidence included:

> 1. A February 25, 2002 letter from the owner of the petitioner's company, which identified the petitioner as the owner of seven McDonald's franchises and the employer of 300 people. Asserting that the proffered position "requires, at a minimum, a Bachelor's Degree or its equivalent in business or a related field such as Tourism Management," the letter described the beneficiary's duties as follows:
>
>> As Operations Manager, [the beneficiary] will be responsible for overseeing the operations of three of the Company's McDonald's franchises. Specifically her duties shall include:
>>
>> - Interpreting and implementing McDonald's policies[;]
>> - Developing operating procedures to facilitate franchise operations;
>> - Interpreting economic data to prepare budget estimates;
>> - Determining work load, personnel, and equipment requirements;

- Inspecting each franchise to ensure that Company service and operating standards are followed;
- Overseeing the hiring of employees;
- Overseeing marketing activities; and
- Overseeing of financial controls.

The letter also described the beneficiary's education and her past experience in McDonald's restaurant management positions.

2. A one-page evaluation by Globe Language Services, Inc., dated February 8, 2002, that determined that the beneficiary's Bachelor of Science in Tourism from the University of Santo Tomas in the Philippines was the equivalent of a U.S. bachelor's degree in Tourism Management.

3. A copy of the beneficiary's college diploma.

By a notice to the petitioner's counsel dated March 29, 2002, the director requested additional evidence. Stating that the evidence so far submitted had not established that the proffered position qualified as a specialty occupation within the meaning of the Act, the request sought documentary evidence which would:

1. Show that, in the petitioner's company or its industry, a baccalaureate in a specific field of study is a standard minimum requirement for the proffered position;
2. Depict, by tear sheet or other documentation, how the petitioner had advertised for the proffered position;
3. Indicate whatever degree requirements the petitioner has formerly required for the proffered position; and
4. Establish that the person named on the college diploma is actually the beneficiary, as there is a discrepancy in last names.

In a reply to the request for additional evidence, filed on June 22, 2002, counsel submitted the following documents as attachments to his cover letter:

1. A June 14, 2002 letter from the owner of the petitioner's company. As evidence that the operations management position qualifies as a specialty occupation, the petitioner attached a letter from Professor Michael Shapiro, described below. The owner's letter also stated that this is the first time that the position has been offered and that the company did not advertise for it. Attached to the letter was a copy of a marriage contract to demonstrate that the beneficiary is indeed the person named in the diploma.

2. A June 10, 2002 "Position Evaluation and Specialty Occupation Verification" letter with attached resume, from Professor Michael Shapiro, Ph.D., which opines that the proffered position is a specialty occupation with a minimum requirement of at least a bachelor's degree in one of several disciplines he specified.

3. A copy of a marriage contract to demonstrate that the name discrepancy is consistent with the beneficiary's name change at marriage.

The owner's letter also indicated that he had been able to "oversee the responsibilities" that would be involved in the beneficiary's position. According to the owner, the rapid expansion of ownership over the past six years from two to six stores, and his desire to further expand, has left him with insufficient time to continue with the oversight responsibilities.

Professor Shapiro's evaluation listed the duties of the proffered position substantially as in the owner's letter that accompanied the petition. Professor Shapiro noted the following college courses as among those which have provided the beneficiary with essential preparation for the proffered position: "Physical and Economic Geography, Introduction to Tourism, World Tourism, Airline Operations, Tourism Research, Principles of Economics, Tour Guiding, Tour & Travel Operations, Tourism Laws & Regulations, Food & Beverage, Tourism Dev. & Marketing, Introduction to Hotel & Restaurant Management, Basic Front Office, Business Correspondence, Principles of Organization & Management, Basic Computer, Tourism Promotion & Marketing, Convention Management, Basic Accounting, Transportation Management, Personnel [M]anagement & [L]abor Relations, and Financial Planning."

The evaluation includes the following conclusions: (1) that "the position of Operations Manager is both complex and specialized and only a person with a degree in this area of expertise, or the equivalent[,] could qualify for the position"; (2) that the proffered position is a "professional position and specialty

occupation" for which a minimum requirement for entry is "a Bachelor's Degree in Business Management, Food & Beverage Management, Food Service Management, Hospitality Management, Hotel Management, Restaurant Management, Travel & Tourism Management, Hotel & Resort Management, [or] Tourism & Recreation Management"; (3) that a requirement for a bachelor's degree or equivalent in one of the fields just enumerated is common to the industry in parallel positions among similar organizations; (4) that it is common practice for employers to hire as operations managers only persons with at least a bachelor's degree or equivalent in one of the fields enumerated above; and (5) that the duties are "so specialized and complex" that the knowledge required to perform them "are usually associated with the attainment of a baccalaureate or higher degree and are necessary."

In denying the petition, the director noted that: (1) the record lacked any evidence from McDonald's Corporation that operation managers of its stores need a bachelor's degree, or equivalent, in any specialty in order to perform their duties; (2) although the owner of the petitioner business was able to handle the duties that would now be incorporated in the newly-created operations management position, there is no evidence that he had the educational qualifications now claimed to be required; and (3) in the absence of evidence about McDonald's hiring standards for the type of position proffered here, the Evaluation and Verification is "immaterial."

Counsel filed a Form I-290B on August 2, 2002 and followed it with a brief on August 30, 2002. Counsel maintains that evidence about McDonald's educational requirements "is irrelevant and unnecessary." To support this position, counsel states that, while it is a Mc Donald's franchise, the petitioner's business is separately owned and, therefore, not subject to McDonald's policies on educational requirements. Insisting that the proffered position is with the petitioner, Lisa Foods Enterprise Partnership, and not with McDonald's restaurants, counsel asserts that the evaluation should be considered and given particular attention on appeal.

In reviewing an appeal, the AAO conducts its own complete and independent review of the record. It is never bound by a decision of a service center or district director. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director was correct in noting the absence of any evidence with regard to the owner's educational credentials. The record establishes that the owner himself had been performing the duties of the proffered position for years, and with responsibility for four additional stores. The lack of information about the owner's educational background weighs against the petitioner as an absence of any evidence that the duties have in the past

required a bachelor's degree or equivalent in a specific specialty area.

The AAO disagrees with the director's determination that Professor Shapiro's evaluation is "immaterial." The fact that the petitioner did not provide evidence of the hiring practices of McDonald's Corporation should not preclude consideration of Professor Shapiro's evaluation, which is certainly relevant to the specialty occupation issue. The absence of one type of evidence which may be relevant should not determine the relevance or preclude the consideration of other evidence that has been presented and that is on its face relevant. Accordingly, the AAO has considered Professor Shapiro's evaluation.

However, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner in this case has not sustained that burden. Although the petitioner presents assertions to the effect that the proffered position qualifies under several criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A), those assertions are not substantiated by factual details.

The following paragraph of Professor Shapiro's evaluation substantially captures his position that the proffered position is a specialty occupation:

> Therefore, it is my professional opinion that the record as presented clearly and convincingly establishes the following: that a baccalaureate or higher degree, or its equivalent[,] is normally the minimum requirement for entry into the position of Operations Manager; that the degree requirement is common to the industry in parallel positions among similar organizations[;] and it is common practice previously and currently for the complex position of Operations Manager that only individuals with baccalaureates or higher degrees with the degree of Business Management, Food & Beverage Management, Hospitality Management, Hotel Management, Restaurant Management, Travel & Tourism management, Hotel & Resort Management, Tourism & Recreation Management or the equivalent are proffered for the position; and that the duties are so specialized and complex that the knowledge required to perform the duties of this position are usually associated with the attainment of a baccalaureate or higher degree and are necessary.

Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evid ence.

Matter of Caron International, 19 I&N Dec. 791 (Comm. 1988).

While certainly relevant, Professor Shapiro's evaluation has very limited weight. It fails to document or adequately explain the factual basis on which the professor based his conclusions.

The professor's experience as described in the Evaluation and Verification and its attached resume has been noted, including but not limited to the fact that he has teaching experience in the management and, in particular, marketing, personnel, retail, sales, and small-business management. However, while relevant and considered by the AAO, these credentials are not sufficient by themselves to establish that the professor's conclusions are valid. 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).

Although certainly relevant, neither the position title nor the employer's self-imposed standards are decisive in analyzing whether a bachelor's degree or its equivalent in a specific specialty is actually a minimum requirement for entry into a position. Rather, the critical, determinative issue is whether the duties of the position actually require 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.

While Professor Shapiro lists the duties that the petitioner has outlined for the prospective position and concludes that it is a specialty occupation, the evaluation lacks information and analysis as to what particular aspects of those duties mandate a bachelor's degree or equivalent in any specialty.

The company owner's June 14, 2002 letter, submitted as part of the reply to the request for additional evidence, provides no substantial or persuasive evidence. The letter maintained that, for the position at issue, both the position itself and the petitioner company require a bachelor's degree in "Business Management, Food & Beverage Management, Food Service Management, Travel & Tourism Management, Hotel & Resort Management, Tourism & Recreation Management or a related field." It also noted how some specific coursework associated with the beneficiary's bachelor's degree in Tourism Management serves to "contribute to operational and management skills," while other courses taken by the beneficiary "provide an individual with a base of knowledge in the fields of economics and finances." The letter fails to address why the duties of the proffered position make it necessary for the petitioner to require a bachelor's degree or equivalent in a specific specialty.

Professor Shapiro also asserted that the proffered position qualifies under the provision of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for a position that has a specialized degree requirement that is common to the industry in parallel positions among similar organizations. However, he provided no specific information as to how he arrived at this determination.

Factors often considered by CIS when determining the industry standard include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook* (*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)).

In this case, there is no evidence of either a professional association requiring a degree in a specific specialty or any firm or agency within the fast food industry providing supporting documentation. However, pages 55-57 of the 2002-2003 *Handbook* provide an overview of food service manager positions, which suggests that, except for perhaps the proffered position's requirements for economic data interpretation and oversight of marketing and financial controls, many of the duties of the operations manager described in the petition would come within the purview of a food service manager. That section of the *Handbook* also indicates that the industry does not require a bachelor's degree in any specialty for food service managers. The petitioner's description of duties is too general to establish how those operations manager duties that are not performed by a food manager would be so much more technical as to require a specialty degree.

Likewise, no persuasive factual basis is presented that would substantiate the professor's statement that the position qualifies under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) because its duties were so specialized and complex that knowledge required to perform them is usually associated with the attainment of a bachelor or higher degree in a specific specialty.

In this particular case, the duties of the position are not indicative of a specialty occupation criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A).

The petition here is defeated not just on the lack of persuasive evidence, but also because the evidence in the record indicates that a baccalaureate degree not just in tourist management but in any one of the following disciplines would meet the proffered position's educational requirements: business management, food and beverage management, food service management, hospitality

management, hotel management, restaurant management, travel and tourism management, hotel and resort management, or tourism and recreation management. If such a wide range of degrees could fulfill the entry-level duty requirements of the proffered position, then the position does not require a degree in a specific specialty as required by 8 C.F.R. § 214.2 (h) (4) (ii).

Again, the burden of proof in these proceedings rests solely with the petitioner. The petitioner has not sustained that burden.

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