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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

JAN 25 2005

FILE: WAC 02 142 50546 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:
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, Director
Administrative Appeals Office

DISCUSSION: The director of the service center 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 gas station that seeks to employ the beneficiary as a shift manager. The petitioner, therefore, 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)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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 shift manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to the company support letter, the beneficiary would perform duties that entail the responsibility of all cash handling; placement of orders for gas and prepare orders for the market; working both alone and on teams; the beneficiary will be responsible for inventory control, banking, internal auditing and administration. The petitioner stated that a candidate for the proffered position must possess a bachelor's degree in business or a related field and relevant experience.

The director determined that the proffered position was not a specialty occupation. The director noted that in the response to the request for evidence, the petitioner provided another job description which differed substantially from the one listed above. The second job description read as follows:

> The manager will perform administrative tasks to ensure that their staffs can work efficiently, ensure equipment and machinery including the computer used in the department to be in good working order, request new equipment or supplies for the department when necessary, planning the work of the staff and supervising them are key functions of this job, oversee the work of the staff and supervising them are key functions of this job, oversee the work of the other managers and the staff that it is proceeding on schedule and meets established quality standards, evaluate each worker's performance, train new supervisors and other managers in organization and office procedures, act as liaison between the clerical staff and the professional, technical and managerial staff, [and] implement new company policies.

Additionally, the petitioner stated that the beneficiary would supervise the work of other managers in other facilities.

The director requested a brief overview of the nature of the petitioner's investment corporations. In response, the petitioner submitted copies of quarterly wage reports and copies of three employees' foreign diplomas without further information of job titles and duties. The director determined that the described duties of the proffered position appear to be general managerial duties as applied to a gas station. Furthermore, the director noted that the submitted information did not indicate that the petitioner normally requires applicants for the position to possess baccalaureate or higher level degrees in the field.

The director stated that a person employed as a manager or executive supervising employees who are working in a specialty occupation are generally also considered members of a specialty occupation. The director noted that although the petitioner was requested to provide a list of all employees under the beneficiary's supervision and management with their respective job titles and a brief description of each employee's duties, and the minimum education, training and experience necessary to perform the job, the petitioner did not provide such information. Therefore, the director was not convinced that these positions qualify as specialty occupations.

On appeal, counsel now asserts that the beneficiary will be performing the duties of an Operations Analyst/Manager. Counsel states "[t]his is the petitioner's job title, however it's [sic] closest corollary is that of Management Analyst." Counsel states the petitioner is seeking the beneficiary's services "to plan the work of staff, evaluate performances, and to implement new company policies, in other words improve operational

control of the company." Counsel further adds that the beneficiary will "perform management and productivity analyses aimed at increasing operational efficiency and cost effectiveness."

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 first considers 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)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

In its response to the director's request for further evidence, the petitioner expanded the beneficiary's duties, adding items such as overseeing the work of other managers and training new supervisors. The petitioner also stated that the beneficiary would implement new company policies. In sum, the initial description appeared to have the beneficiary doing more of the actual work, handling cash and inventory control at a gas station, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation.

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). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. *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. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description. Therefore, the analysis of this criterion will be based on the job description submitted with the initial petition.

On appeal, counsel states the petitioner "will clarify the position duties in order to convince [CIS] of the professional nature of this position." Counsel's brief describes the duties of an operations analyst/manager

and contends that it is a specialty occupation. However, as stated above, the analysis of this criterion will be based on the job description submitted with the initial petition.

A review of the *Handbook* discloses that the duties of the proffered position are performed by a cashier. The *Handbook* states supermarkets, department stores, gasoline service stations, movie theaters, restaurants, and many other businesses employ cashiers to register the sale of their merchandise. Most cashiers total bills, receive money, make change, fill out charge forms, and give receipts. The *Handbook* reports that although specific job duties vary by employer, cashiers usually are assigned to a register at the beginning of their shifts and are given drawers containing a specific amount of money with which to start – their "banks." Depending on the type of establishment, cashiers may have other duties as well. These correspond to the beneficiary's duty to "be responsible for all cash handling . . . place orders for gas and prepare orders for the market. Working both alone and on teams, [the beneficiary] will be responsible for inventory control, banking, internal auditing and administration." Because the *Handbook* reveals that a cashier does not require a bachelor's degree, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the particular position, shift manager.

No evidence in the record establishes the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. Again, the *Handbook* reports that the duties of the proffered position are performed by a cashier, a job that does not require a bachelor's degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. Once again, the *Handbook* reveals that a cashier, an occupation not requiring a bachelor's degree in a specific specialty, performs the proffered position of shift manager.

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.

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.