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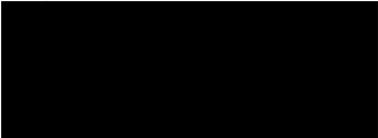
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FILE: SRC 03 100 54082 Office: CALIFORNIA SERVICE CENTER Date: **JAN 06 2005**

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:



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 service center director denied the nonimmigrant visa petition. 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 funeral home that seeks to employ the beneficiary as a funeral director. 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 stated that the position did not require a baccalaureate degree, and denied the petition because the petitioner did not submit requested evidence with regard to the beneficiary's qualifications. On appeal, counsel states the director's request for evidence was misstated, and submits further documentation.

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.

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 petitioner's letter of support; (3) the director's two requests for additional evidence; (4) the petitioner's two responses to the director's request; (5) the director's denial letter; and (6) 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 funeral director. Evidence of the beneficiary's duties includes: the I-129 petition; and the petitioner's letters in response to the director's request for further evidence. According to the petition, the beneficiary would arrange funerals. Within this overall duty, the beneficiary would meet with families; embalm, apply cosmetic aids, and place bodies in caskets for viewing and services; liaise with church and cemeteries to schedule funeral services; organize and supervise staff during visitations and funeral services; order merchandise; and prepare and file legal papers. The petitioner did not state what academic credentials it required a candidate to possess for the position.

In his decision, the director referred to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of funeral directors and stated that a baccalaureate degree was not a prerequisite for entry into the proffered position. The director stated that in order for the position to be a specialty occupation, it had to require a baccalaureate degree. The director further stated that the petitioner had not provided requested evidence with regard to the beneficiary's qualifications, namely, an evaluation of the beneficiary's education performed by a reliable evaluation service, and therefore the petition could not be approved. Although the director raised the issue of whether the petitioner had submitted a certified LCA on filing the instant petition in his initial request for further evidence, he did not examine this issue in his decision.

On appeal, counsel states that the decision in the instant petition is a non-decision because the cover letter of the decision omitted the words "is denied". Counsel also states that the director's denial of the petition based on the petitioner's failure to submit an evaluation of the beneficiary's education is insufficient to justify the denial. Counsel asserts that the director's second request for information required either an evaluation of the beneficiary's education, or letters from the beneficiary's previous employers including dates of employment, title, and duties performed by the beneficiary, and that the submission of either type of documentation was sufficient. Counsel submits an educational evaluation document prepared by [REDACTED] Director, Educational Assessment, Inc., Athens, Georgia. In this document, [REDACTED] examines the educational credentials of the beneficiary, and then examines the beneficiary's work experience.

Although counsel asserts that the director's decision is a non-decision because of the omission of the specific adjudicative action taken on the decision's cover letter, the AAO views this omission as a typographical error. However, the AAO finds that the director's decision does lack clarity in parts. While the director discussed the academic credentials of funeral directors in his decision, implicitly finding that the occupation of funeral director does not require a baccalaureate degree as a minimum requirement for entry into the occupation, he did not address any of the other criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A) that may be used by the petitioner to establish that the proffered position is a specialty occupation. In addition, the director also did not clearly determine whether the beneficiary was qualified to perform the duties of the position, but rather stated that insufficient evidence was placed on the record to approve the petition. While the lack of clarity in the director's decision is noted, the decision to deny the petition is correct.

The AAO will discuss all four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), as well as discuss whether the beneficiary is qualified to perform the duties of the position. Finally, the AAO will examine the regulatory criteria for the submission of a certified LCA.

With regard to whether the proffered position is a specialty occupation, the petitioner has established none of the 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. As correctly stated by the director, the *Handbook* indicates that most states require funeral directors to have two years of formal studies that includes mortuary studies, to serve a 1 year apprenticeship, and to pass a qualifying examination. While a funeral director may be required to have an associate's degree in a specific specialty, namely, mortuary sciences, this level of academic studies is not sufficient to establish the position as a specialty occupation. As previously stated, a specialty occupation requires a bachelor's degree or its equivalent in a specific specialty. Thus, the *Handbook* does not establish that the proffered position is a specialty occupation.

With regard to parallel positions in similar businesses, neither counsel nor the petitioner provided any further documentation. The petitioner did not provide documentation from professional mortuary associations or individuals in the industry as to whether a baccalaureate degree in a specific specialty is required for entry into the profession. The petitioner also did not provide sufficient 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. As previously stated, the petitioner did not state the academic credentials required for its funeral directors. Although the petitioner stated in its response to the director's first request for further evidence, that it believed the beneficiary's associate degree and her previous management experience qualified her for the proffered position, it provided no documentation on the academic credentials of previous or current funeral directors in its employ. Therefore the petitioner has not met this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(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 majority of duties of the position appear routine to the operations of any funeral home. The petitioner provided no further detail as to any specialized or complex duties that the beneficiary would perform as funeral director. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A). Thus, the petitioner has not established that the proffered position is a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

With regard to whether the beneficiary is qualified to perform the duties of the position, Part A of the Form I-129W petition states that the beneficiary's highest level of education is an associate's degree. The director sent two requests for further evidence with regard to the equivalency of the beneficiary's educational credentials or work experience to a U.S. baccalaureate degree. On August 14, 2003, the director asked for evidence that the beneficiary had the equivalent of a baccalaureate degree, and requested copies of the beneficiary's degree and other documentation. In response to this request, the petitioner submitted documentation of the beneficiary's U.S. associate degree in funeral services from St. Petersburg Junior College, St. Petersburg, Florida, and her required state license.

In his second request dated August 18, 2003, the director asked the petitioner to submit an evaluation of the beneficiary's education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials, or to submit letters with regard to the beneficiary's work experience to prove the equivalency of the beneficiary's work experience to the baccalaureate level training that the beneficiary lacked. In response, the petitioner submitted a letter from the Hoechst Company, for whom the beneficiary had worked for six years. This letter described the beneficiary's work experience, in both administrative and supervisory areas. The director then denied the petition because of the petitioner's failure to provide an evaluation of the beneficiary's education. On appeal, counsel submits an educational evaluation document and a work and training evaluation document that determined the beneficiary has the equivalent of a U.S. business administration degree in management from an accredited college or university.

It is not clear why the director requested an educational evaluation by a company that specializes in evaluating foreign educational credentials, since the petitioner had provided no evidence that the beneficiary possessed any foreign academic credentials, or had any education beyond an associate's degree. The U.S. degree undertaken by the beneficiary in mortuary sciences does not require any such educational equivalency document. In addition, such a document would only examine the foreign education of the beneficiary, not her work or training experience. A credentials evaluation service may not evaluate an alien's work experience or training; it may only evaluate educational credentials. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). For purposes of this proceeding, the director's request for a educational credentials evaluation was irrelevant.

The record clearly establishes that the beneficiary does not have a U.S. baccalaureate degree, but rather an associate's degree. It also establishes that the beneficiary does not have a foreign baccalaureate degree, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(1) or (2). With regard to the beneficiary's license to be a funeral director and embalmer, the possession of such a license is not relevant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(3), as the proffered position is not a specialty occupation. Thus, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), namely, that the beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials; or
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has

achieved recognition of expertise in the specialty occupation as a result of such training and experience.

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation<sup>1</sup>;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

With regard to the beneficiary's work experience, the petitioner submitted a letter from the Hoechst company in Great Britain that described the beneficiary's six years of employment with them. Her job titles at the company are listed as "executive assistant/1st level manager." Her job duties included supervising four British sales representatives, organizing meetings and conferences, overseeing the day-to-day running of the sales office, and assisting the sales manager with compiling annual budgets. The petitioner provided no information with regard to the academic credentials of the beneficiary's co-workers, or any recognition of expertise on the part of the beneficiary. The petitioner provided insufficient evidence to establish 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). It should also be noted that the work performed by the beneficiary in her previous job is not analogous with the duties of a funeral director, which is the proffered position examined in this proceeding. Thus, the petitioner has not established that the beneficiary is qualified to perform the duties of the position. Accordingly, the petitioner failed to establish that the proffered position is a specialty occupation

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<sup>1</sup> *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. § 214.2(h)(4)(ii).

or that the beneficiary is qualified to perform the duties of the position. Thus, the director's decision will not be disturbed.

With regard to the issue raised by the director as to whether the petitioner had submitted a certified LCA, 8 C.F.R. § 214.2 (h)(4)(i)(B)(1) states:

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.

The petitioner did not submit a certified LCA when it filed the instant petition. In response to the director's request for further evidence, the petitioner submitted an LCA dated August 5, 2003, which is after the filing date of the instant petition. CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12). 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). For this additional reason, the petition cannot be approved.

Finally, the AAO notes that, on appeal, counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS approved the petitioner's initial H-1B petition for the beneficiary. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Texas Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (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.