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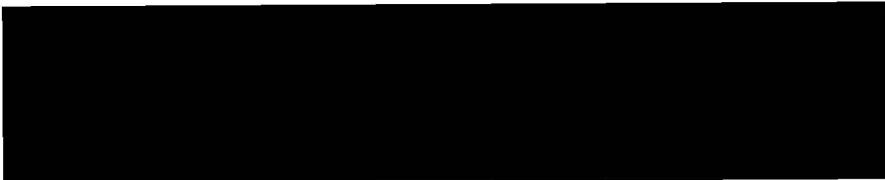
Date: JUN 02 2006

IN RE: Petitioner:
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:



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.

sa Michael T. Kelly
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director of the Texas 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 convenience store with two gas pumps, 3 employees, gross retail store sales of approximately \$360,000, gas sales of approximately \$420,000, and lottery sales of approximately \$700,000, and owns a gas station that it rents to another operator. The business was established in 1998. It seeks to employ the beneficiary as a business manager 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE, dated February 25, 2004; (4) the director's denial letter; (5) the petitioner's motion to reconsider; (6) the director's denial of the motion to reconsider; and (7) Form I-290B, with counsel's brief and new and additional evidence.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. CIS 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 nor 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 baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary’s services as its business manager. At the time of filing, and in response to the RFE, the petitioner stated that the duties of the proffered position were as follows:

- Direct and coordinate activities of two (2) business locations;
- Coordinate with senior management;
- Design and implement strategies in pricing, sales and marketing, purchasing and personnel; and
- Maximize operational efficiency and profitability.

The petitioner stated that it required a bachelor’s degree.

The director found that the proffered position was not a specialty occupation because the duties are not so specialized and complex as to require a bachelor’s degree in a specific field of study. The director noted that the business operations of a convenience store with a gas station operating 24 hours, 7 days per week with 3 employees are not so complex as to require the beneficiary to be primarily engaged in managerial level duties. The director found that the petitioner leases the second location, but does not employ personnel at the second location. 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, and in the response to the RFE and in the motion to reconsider, counsel asserts that the managerial position has duties that are complex and require a bachelor’s degree and points to the Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)* section on education and

training for business managers and the specific vocational preparation (SVP) rating in the Department of Labor's *Dictionary of Occupational Titles (DOT)*.

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 director indicated that the position of business manager, in general, is normally a specialty occupation. The AAO disagrees. The occupation of top executives and managers listed in the *Handbook* indicates that the formal education of top executives varies, and that many top executives may be promoted from within an organization. For those positions that require a bachelor's degree, a wide variety of educational backgrounds will suffice. Thus, the position of top executives or managers is not generally a specialty occupation, as a degree in a specialty is not required as a minimum for entry into the occupation.

The AAO notes that in the RFE the director requested specific details about the business to enable the director to determine the extent of managerial duties that will be performed by the beneficiary. In its response to the RFE the petitioner provided a description of the business operations, the 2003 employer's unemployment tax return reflecting \$5,000 in taxable wages, a Georgia sales tax return for December 2003 reflecting sales of \$33,525, and several invoices for gasoline, snack foods and miscellaneous items. The petitioner also submitted an evaluation by [REDACTED] a professor of management, stating that the duties of the business manager position are specialized and require the theoretical and practical application of a body of highly specialized knowledge, and that the industry standard would require a bachelor's degree in Business Administration, Management, or a related field to fill the position. The AAO notes that the letter from Dr. [REDACTED] indicates that the duties described in his letter would require a degree in business administration or management. The duties listed in Dr. [REDACTED] letter, however, are not the duties specified by the petitioner in its letter of support, on the Form I-129, or in response to the RFE. Thus, the letter is not probative as to the educational requirements to perform the duties of the proffered position. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

To determine whether the duties just described are those of 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Handbook*, on which the AAO routinely relies for the educational requirements of particular occupations, 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The AAO first turns to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO agrees with the director that the record does not establish that the beneficiary will perform the duties of a top executive or business manager. While the petitioner indicates on the Form I-129 that it employs 3 people, the total taxable wages for 2003 were \$5,000. The second business location appears to be rented to another establishment. Given the nature of the petitioner's business, its activities, and organizational structure, the AAO finds that the duties of the proffered position are similar to those of a sales worker supervisor as described in the 2006-2007 *Handbook* at <http://www.bls.gov/oco/ocos025.htm>.

The *Handbook's* description of sales worker supervisor states:

Sales worker supervisors oversee the work of sales related workers, such as retail salespersons, cashiers, customer sales representatives, stock clerk and order filers, ... are responsible for interviewing, hiring, and training employees, as well as for preparing work schedules and assigning workers to specific duties. Many of these workers hold job titles such as sales manager or department manager. Under the occupational classification system used in the *Handbook*, however, workers with the title *manager* who mainly supervise nonsupervisory workers are called *supervisors* rather than *managers*, even though many of these workers often perform numerous managerial functions....

In retail establishments, sales worker supervisors ensure that customers receive satisfactory service and quality goods. They also answer customers' inquiries, deal with complaints, and sometimes handle purchasing, budgeting, and accounting. Their responsibilities vary with the size and type of establishment.

With respect to the educational qualifications for sales worker supervisors, the *Handbook* states:

Sales worker supervisors usually acquire knowledge of management principles and practices—an essential requirement for a supervisory or managerial position in retail trade—through work experience. Many supervisors begin their careers on the sales floor as salespersons, cashiers, or customer service representatives. In these positions, they learn merchandising, customer service, and the basic policies and procedures of the company.

The educational backgrounds of sales worker supervisors vary widely.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* does not establish a specific degree requirement for sales worker supervisor, but emphasizes related work experience. The *Handbook* is clear that a degree or its equivalent is not the normal minimum requirement for entry into the occupation.

On appeal, and in response to the RFE the petitioner notes that the *Dictionary of Occupational Titles (DOT)* assigns a Specific Vocational Preparation (SVP) rating of 8 to the occupation of business manager. Counsel contends that this rating indicates that the duties of the position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. However, the AAO has determined that the proffered position is not that of a business manager and, therefore, this information is not relevant to these proceedings. Moreover, as previously discussed, the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – the petitioner must establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that they can be performed only by an individual with a degree.

Regarding parallel positions in the petitioner's industry, the petitioner submitted 3 Internet job postings for managers. Two of the advertisements are from a convenience store chain. The third advertisement is for a household cleaning cooperative, a business unrelated to the petitioner's. None of the advertisements require a degree in any field. Further, the duties of the advertised positions are not specific enough to compare with the job duties of the proffered position. Thus, the petitioner has not established that a degree requirement is common to the industry in parallel positions among similar organizations.

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 AAO finds the petitioner to have provided no evidence that would support a finding that the job duties are so complex or unique that they can be performed only by an individual with a degree.

As previously discussed, the support letter from Dr. [REDACTED] does not establish that a degree requirement is common to the industry in parallel positions among similar organizations. The AAO notes that the letter is not accompanied by documentation to establish that firms similar to the petitioner offering jobs similar to the proffered position employ individuals with a degree in a management-related field. Going on record without supporting documentary evidence is not sufficient for the purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). No other evidence of record establishes the first prong of the second criterion.

Therefore, the petitioner has failed to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The record also fails to establish that the position qualifies as a specialty occupation under the second prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree. The organizational complexity of the petitioner is unclear, and the petitioner has not established that only a degreed individual can perform the duties. Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. To determine the petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. However, in the instant case, counsel has indicated that the proffered position is newly created.

Accordingly, the petitioner is unable to provide evidence of its normal hiring practices with regard to the proffered position and has not established it as a specialty occupation on this basis.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. On appeal, counsel contends that the duties of the proffered position satisfy the criterion's requirements. Counsel asserts that the petitioner's business is complex, having two locations currently under separate management, and which may require integration of the two business locations. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO requires information regarding the specific duties of a proffered position, as well as the nature of the petitioning entity's business operations, to make its determination regarding the position's degree requirements, if any. In the instant case, the record offers a general description of the type of work to be performed, rather than a description of the proffered position's duties as they relate to the petitioner's business. As the petitioner has provided no description of the specific tasks to be performed by the beneficiary, the record contains no evidence to establish the specialized and complex nature of those tasks. The petitioner has not submitted the tax returns, organizational chart, financial statements or other documentation to establish that the complexity of the duties requires a 4-year degree in business administration, management, or a related field. The record does not establish the complexity of the duties that the beneficiary will provide in supervising or managing a combination gas station and convenience store business, and a rental gas station. Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the services of a specialty occupation. The petitioner submitted an educational evaluation of the beneficiary's combined education and work experience to establish the beneficiary's qualifications. A

credentials evaluation service may evaluate education only. *See*: 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). The evaluation does not comply with the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) in that it is not from a representative of an accredited university who has authority to grant credit for training and experience, from an university that has a program for granting such credit. Thus, the record does not establish that the beneficiary is qualified to perform the services of a specialty occupation. For this additional reason, the petition may not be approved.

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), or that the beneficiary is qualified to perform the duties of 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.