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U.S. Department of Homeland Security
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Washington, DC 20536



U.S. Citizenship
and Immigration
Services



FILE: LIN 02 289 52427 Office: NEBRASKA SERVICE CENTER Date: APR 26 2004

IN RE: Petitioner:
Beneficiary



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)

ON BEHALF OF PETITIONER:



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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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 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 restaurant chain that seeks to employ the beneficiary as its operations manager. The petitioner 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 and the beneficiary is not qualified to perform a specialty occupation. On appeal, counsel submits a brief.

The AAO will first address the director's conclusion that the position is not a specialty occupation.

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 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 its operations manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 18, 2002 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: establishing company policies and procedures, and ensuring compliance; negotiating and maintaining contracts, licenses, and insurance; establishing and maintaining budget, cash and cost control, and asset protection procedures; reconciling daily receipts and sales; verifying billings and reconciling monthly bank statements; preparing monthly and quarterly operating and financial reports and budget performance analysis; making recommendations and plans for improvement for presentation to senior management; reviewing all invoices and authorizing payments; establishing and maintaining vendor relationships; ordering equipment, maintenance, and repairs; developing comprehensive staffing strategies and training programs; documenting and maintaining personnel records and overseeing performance evaluations; consolidating, managing, and ordering all inventories; spot-checking food preparation; promoting and maintaining on-the-job safety; coordinating and documenting restaurant operations, inventory, and personnel transfers; resolving employee/customer complaints; and attending industry conferences and community events. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in management hospitality.

The director found that the proffered position, which parallels that of a food service manager, was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. 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, counsel states, in part, that the proffered position "requires the expertise and experience in running the 'operations of a corporation' overseeing a staff of 90 plus employees for three (3) wholly owned restaurants consisting of six restaurant managers and assistant managers, nine chefs, six plus cashiers and hostesses, waiters and waitresses and numerous kitchen help and office help." Counsel further states that the proffered position is a top executive position, not a food service manager position, "where the manager is on-site in charge of running that particular restaurant and directly involved with the customers and the food they eat." Counsel additionally states that the record contains Internet job postings to demonstrate that the degree requirement is industry wide.

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 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. The AAO does not concur with counsel that the proffered position is a specialty occupation. The proffered position is similar to “general and operations managers” as described under the Top Executives category in the *Handbook*. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree in a specific specialty is required for general and operations managers. Many top executives/general and operation managers have a bachelor’s degree in business administration or liberal arts.

Regarding parallel positions in the petitioner’s industry, the petitioner submitted various Internet job postings for a variety of positions. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. For example, one of the advertised positions is that of a branch manager for Facilitec, Inc., which is the leading provider of rooftop grease containment products and kitchen exhaust cleaning services. The petitioner’s industry, however, is not in the cleaning industry. Additionally, there is no evidence to show that the duties of the proffered position are as complex as those described for the advertised positions. For example, one of the positions is that of a general manager/chef, whose duties entail planning, organizing, and managing two residence hall dining services at Stanford University, to include, in part: residential student meals; executive dining and conference services; catering and special events; and directing and coordinating the work of assistant managers, and a production and service staff. It is further noted that some of the advertised positions do not specify a baccalaureate degree in a specific specialty. For example, one of the advertised positions is that of a purchasing manager for Round Table Pizza, which requires “a college education, and preferably either APP or CPM certification.” The employer issuing the posting does not specify a baccalaureate degree in a specific specialty, nor is the certification required rather than preferred. It is also noted that the proffered position is not that of a purchasing manager. Another position, that of a restaurant manager for a restaurant in North Carolina, also does not specify a baccalaureate degree in a specific specialty. Rather, the educational requirement is described as follows: “BA/BS 4-5 year degree or foreign equivalency.” In view of the foregoing, the advertisements have little relevance.

The record contains an opinion from Charles McClintock, Ph.D., Dean, Fielding Graduate Institute, Professor Emeritus, Cornell University, who states, in part: “It is my opinion that the employer’s position description as highlighted above is always filled by an individual with the minimum of a bachelor’s degree in restaurant/hotel management, business administration, or related field. . . .” The record also contains an opinion from Jean Benchet of the The French Culinary School, who states, in part: “It is my opinion, based on all my years in the hospitality industry, that the most successful restaurants . . . typically have an operations manager/general manager responsible for all aspects of the restaurant’s operations and typically, that person possesses a bachelor’s degree in hospitality, business administration, marketing, or [a] related field.” Neither Dr. McClintock nor Mr. Benchet, however, provides any evidence in support of his opinion. 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).

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 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 counsel does not address this issue on appeal, it will not be discussed further.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(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 duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. However, as the AAO is dismissing the appeal because the job is not a specialty occupation, it will not discuss the beneficiary's qualifications.

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.