

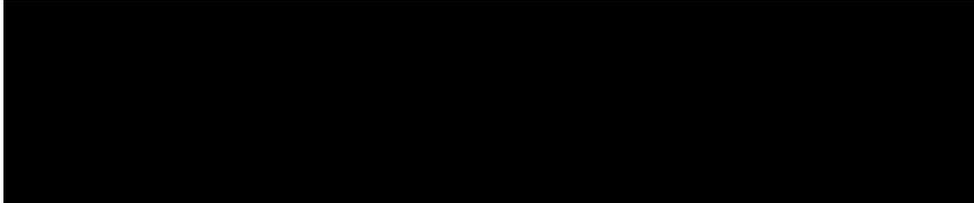
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U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: LIN 02 071 51307 Office: NEBRASKA SERVICE CENTER Date:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed a subsequent appeal, finding that no additional evidence was received in support of the appeal. The matter is again before the AAO on a motion to reopen or reconsider. On motion, counsel submits evidence that additional evidence was timely submitted in support of the appeal. The motion will be granted. The previous decision shall be affirmed. The petition will be denied.

The petitioner is a Chinese restaurant franchise management business that seeks to employ the beneficiary as a multi-unit general manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to § 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 motion, counsel submits a brief and copies of the evidence that was previously submitted in response to the director's request for evidence, including a publication entitled *National Restaurant News of Top 100*, and Internet job announcements.

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 director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; (5) Form I-290B and supporting documentation; (6) the AAO's summary dismissal; and (7) the petitioner's motion to reconsider. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a multi-unit general manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's December 11, 2001 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: directing and coordinating activities of subordinate managerial personnel involved in operating restaurants in assigned area; assessing and analyzing the management of food and beverage product goals; evaluating performance and terminating employment of general managers; reviewing operational records and reports of general managers to project sales and determine store profitability; comparing performances in assigned area; coordinating sales and promotional activities of store managers; analyzing management and operational problems and formulating solutions; developing and implementing marketing programs and strategies; preparing reports for upper management and recommending additional sites or deletion of existing stores; and inspecting premises of assigned locations to ensure compliance with safety and related ordinances. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in economics, business administration, or an equivalent thereof.

The director found that the proffered position, which is that of a food service manager, was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2000-2001 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 motion, counsel states, in part, that the proposed duties, which entail supervising two to five locations, are so specialized and complex as to require a related baccalaureate degree. Counsel states further that the petitioner normally requires that its general managers of operations hold a related bachelor's degree and submits copies of its Internet job postings for "General Manager/Assistant Manager – Operations" jobs as supporting documentation. Counsel submits a copy of the publication entitled *National Restaurant News of Top 100*, which, according to counsel, demonstrates that a bachelor's degree is required or preferred for a general manager position.

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. Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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, which is primarily that of a food service manager, is a specialty occupation. No evidence in the *Handbook*, 2004-2005 edition, indicates that a baccalaureate or higher degree, or its equivalent, is required for a food service manager job. Furthermore, upon review of the proposed duties, it is not clear how the beneficiary could realistically supervise two to five restaurant locations when information on the petition indicates that he will be assigned to work in a fast-food establishment in a shopping mall food court. Accordingly, the exact nature of the proffered position is unclear. The record contains no explanation for this inconsistency.¹ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

According to counsel, the publication entitled *National Restaurant News of Top 100* demonstrates that a bachelor's degree is required or preferred for a general manager position. A review of this publication indicates that it provides "brand-by-brand assessments and three-year performance comparisons of individual organizations whose aggregate sales account for approximately 40 percent of the entire consumer foodservice market in the United States." It is not clear on what basis counsel concludes that this publication serves as evidence that a bachelor's degree is required or preferred for a general manager position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported 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).

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for various positions. These postings, however, do not demonstrate that a baccalaureate degree in a specific specialty is required for entry into the positions. For example, one of the advertised positions is that of an operations consultant for a Dairy Queen establishment, with requirements described as: "Bachelor's degree in business, education, marketing or hotel/restaurant management required – or – Associates degree with a minimum of two years experience with IDQ. . . ." An associate degree and two years of related experience, however, do not equate to a baccalaureate degree for CIS purposes. Another advertised position is that of an "Assistant Manager II, Restaurant" for Disneyland, with requirements described as: "College degree or 2-4 years equivalent experience." Again, this description demonstrates that a baccalaureate degree in a specific specialty is not a requirement. It is also noted that the record contains no evidence to show that some of the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to

¹ It is further noted that a review of the Internet website at <http://hotjobs.yahoo.com> finds the following requirement for the petitioner's general and assistant manager jobs: "2 years of Restaurant Management experience *and/or* Bachelor's degree in Hospitality/Food Service." (Emphasis added.) Two years of related experience, however, do not equate to a baccalaureate degree for CIS purposes. The record contains no explanation for the inconsistency found between the proffered position's job requirements described at <http://hotjobs.yahoo.com>, as opposed to the petitioner's own website, which stipulates the requirement of a related bachelor's degree.

the instant position. For example, one of the advertised positions is that of an operations manager for one of the largest U.S. manufacturers of metal containers. The petitioner's industry, however, is not in manufacturing. Thus, the advertisements have little relevance.

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, therefore, has 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. On motion, counsel states that the petitioner's website information demonstrates that its general manager positions require a baccalaureate degree.² The record does not contain any evidence of the petitioner's past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

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 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 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 previous decision of the AAO, dated December 22, 2003, is affirmed. The petition is denied.

² As discussed above, however, the website information at <http://hotjobs.yahoo.com> does not corroborate counsel's claim.