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U.S. Citizenship
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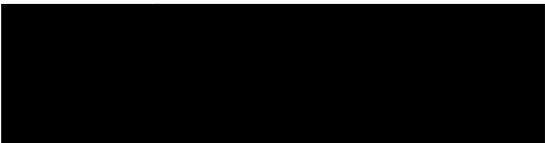


FILE: EAC 03 150 53498 Office: VERMONT SERVICE CENTER Date: MAY 17 2005

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 director of the Vermont 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 corporation operating a Japanese restaurant as its primary business. It seeks to hire the beneficiary as an operations manager. The director denied the petition because he determined that the proffered position did not meet any of the criteria for classification as 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; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, which offers a statement from counsel. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in establishing that its proffered position is a specialty occupation, a 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 an operations manager. Evidence of the beneficiary’s duties includes: the Form I-129; a letter of support from the petitioner, submitted at the time of filing; and counsel’s July 14, 2003 response to the director’s request for evidence.

At the time of filing, the petitioner listed the following general duties for its position of operations manager:

- Plan, direct and coordinate the company’s daily business operations;
- Formulate business operations policy and plans;
- Plan and prepare budgets;
- Conduct business liaison;
- Negotiate contracts;
- Direct personnel matters, including hiring and firing, promotions and demotions, salary and benefits; and
- Oversee corporate accounting, auditing, taxation and government regulatory matters.

In response to the director’s request for further information regarding the proffered position, counsel submitted the following further explanation of the position’s responsibilities, stating the beneficiary would be required to:

- Review business documents, including proposals, memoranda, contracts, agreements, letters of intent and all business related papers prepared and submitted by employees (20 percent of the beneficiary’s time);
- Oversee the petitioner’s internal management and administration, including supervising and evaluating the work of employees under his leadership, coordinating the work of project directors, reviewing the application of executive position applicants and overseeing the interviews of eligible applicants, determining salaries, promotions, rewards, bonuses and disciplinary measures (25 percent of the beneficiary’s time);

- Communicate with the petitioner's patrons or with business counterparts, including business negotiations and provide written and oral guidance to project directors (25 percent of the beneficiary's time);
- Attend business meetings, conferences, exhibitions, shows, business lunches, and banquets and visit American manufacturers (10 percent of the beneficiary's time);
- Participate in contract negotiations (10 percent of the beneficiary's time);
- Oversee and review the petitioner's financial operations, including accounting, auditing, banking, L/C transactions and shipping (5 percent of the beneficiary's time); and
- Conduct unspecified managerial duties (5 percent of the beneficiary's time).

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns 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; 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 (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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)).

In his denial, the director concluded that the proffered position was that of a restaurant manager, discounting the petitioner's description of certain duties, e.g., "coordinating the work of project directors," as unrelated to its business. On appeal, counsel contends that the petitioner is not simply a restaurant, but a multi-faceted business, with growing trading operations, and recently purchased chicken farms.

While the AAO takes note of counsel's assertions, it finds the record to support the director's finding concerning the nature of the petitioner's business. At the time of filing, the petitioner's letter of support described its business as a restaurant, indicating no other types of business operations. Further, the evidence submitted by the petitioner to support its H-1B petition -- its March 22, 2003 offer of employment to the beneficiary that describes the proffered position as an operations manager for the Koto Japanese Sushi & Grill Restaurant and its tax records, which address only its restaurant business -- identifies it as a restaurant. Although in response to the director's request for evidence, counsel stated the petitioner was a "multi-faceted business operation entity" and "heavily involved in U.S.-Japan-China business triangle business transactions of tangible cargos," no description of these additional business activities was provided, nor were the duties of the proffered position discussed in relation to them. Therefore, the AAO concludes that the record, at the time of the director's decision, established only the petitioner's restaurant business. In this context, it finds the operations manager position described by the petitioner to reflect the duties of a food service manager, as discussed at pages 42-43 of the 2004-2005 edition of the DOL *Handbook*:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, they oversee the inventory and ordering of food, equipment and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training.

In most full-service restaurants and institutional food service facilities, the management team consists of a general manager, one or more assistant managers, and an executive chef

Managers . . . estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met.

Managers must be good communicators. They need to speak well, often in several languages, with a diverse clientele and staff. They must motivate employees to work as a team, to ensure that food and service meet appropriate standards

In addition to their regular duties, food service managers perform a variety of administrative assignments [M]ost general managers retain responsibility for the accuracy of business records.

Technology influences the jobs of food service managers in many ways, enhancing efficiency and productivity To minimize food costs and spoilage, many managers use inventory-tracking software to compare the record of sales . . . with a record of the current inventory.

In that the proffered position appears closely aligned to that of a food service manager, the AAO turns to the *Handbook's* discussion of whether the occupation normally requires a baccalaureate or higher degree, or its equivalent, for entry into the profession. The *Handbook*, at page 44, reports the following educational requirements for those seeking employment as a food service manager:

Most food service management companies and national or regional restaurant chains recruit management trainees from 2- to 4-year college hospitality management programs. Restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions – particularly self-service and fast-food – are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager of management trainee jobs. Executive chefs need extensive experience working as chefs, and general managers need prior restaurant experience, usually as assistant managers.

In that the *Handbook* finds the occupation of food service managers to impose no degree requirement on individuals seeking employment, the petitioner cannot establish that its proffered position is a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

In response to the director's request for evidence, counsel references the DOL *Dictionary of Occupational Titles (DOT)* as supporting her contention that the proffered position of operations manager requires the minimum of a baccalaureate degree. Although the AAO has found that the proffered position is not that of an operations manager, it also notes that 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. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation.

The AAO now turns to a consideration of whether the petitioner, although unable to establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three criteria remaining: a degree requirement is the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position; or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. However, a review of the record finds the petitioner has submitted no evidence to establish its degree requirement as standard within the restaurant industry or that the proffered position is particularly complex or unique. Further, the AAO finds nothing that documents the petitioner's normal hiring practices regarding its proffered position. Therefore, the AAO will consider only whether the duties of the proffered position meet the requirements of the fourth criterion at 8 C.F.R. 214.2(h)(4)(iii)(A) – whether they are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The position described by the petitioner would require the beneficiary to oversee all aspects of its restaurant business. On appeal, counsel contends that the general manager of a high level, prestigious restaurant needs a baccalaureate or higher degree to "survive in competition." However, a review of the duties of the proffered position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than what would normally be expected of restaurant or food service managers who routinely oversee a range of demanding and complex activities associated with the restaurant business. Therefore, the AAO finds that the position does not qualify as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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. 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.