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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



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File: LIN-00-116-51742 Office: Nebraska Service Center

Date: **DEC 21 2001**

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)

IN BEHALF OF PETITIONER:



Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant with approximately 13 employees and a gross annual income of \$500,000. It seeks to extend its authorization to employ the beneficiary as a restaurant manager for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation. The director also denied the petitioner's request for an extension of stay on behalf of the beneficiary.

On appeal, counsel submits a brief.

Pursuant to 8 C.F.R. 214.2(h)(10)(iii), there is no provision for an appeal from the denial of an extension of stay. As such, that part of the director's denial is not an issue in this proceeding and will not be discussed further.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the petitioner had not established that a baccalaureate degree is normally required for a restaurant manager position. On appeal, counsel states, in part, that food service employers are increasingly requiring baccalaureate or higher degrees for management positions. Counsel further states that the beneficiary's proposed duties, which include developing the business franchise potential, are so complex as to require a baccalaureate or higher degree.

Counsel's statement on appeal is not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Management of Mandarin[sic]/Chinese restaurant in Topeka Ks. Will supervise and instruct kitchen staff in preparation of food items.

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree or higher in a specialized field. (In the instant case, the beneficiary holds a master of business administration degree.) A review of the Department of Labor's Occupational Outlook Handbook, 2000-2001 edition, at pages 76-78 finds no requirement of a baccalaureate degree in a specialized area for employment as a restaurant or food service manager. Some restaurant and food service managers are promoted from the ranks of restaurant workers. Others hold baccalaureate and associate (two-year) degrees in restaurant management and other fields of study. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary. ted field.

Second, although the petitioner has been in business since 1986, the petitioner has not shown that it has, in the past, other than the beneficiary, required the services of individuals with baccalaureate or higher degrees in a specialized area such as business administration, for the offered position. Third, the petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services

of individuals in parallel positions. (It is noted that none of the 11 job announcements submitted by the petitioner indicate that a baccalaureate degree in a specific field of study is required. Rather, various educational backgrounds are acceptable, including the following: high school education; associate's degree; culinary training; and bachelor degrees with no field of study specified.) Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Beyond the decision of the director, the record does not contain a certified labor condition application as required by 8 C.F.R. 214.2(h)(4)(iii)(B). As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

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.