



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536



JUL 26 2001

File: LIN 99 058 51457 Office: Nebraska Service Center Date:

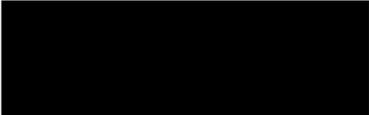
IN RE: Petitioner:
Beneficiary:



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)

Public Copy

IN BEHALF OF PETITIONER:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

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Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a restaurant and catering firm with 14 employees and asserted gross annual income of \$300,000. It seeks 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.

On motion, counsel reiterates his argument that the proffered position is a specialty occupation and the beneficiary is qualified to perform the duties of a specialty occupation.

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), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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 section 214(i)(2) of the Act, 8 U.S.C. 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(B), the petitioner shall submit the following with an H-1B petition involving a specialty occupation:

1. A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,
2. A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay, and

3. Evidence that the alien qualifies to perform services in the specialty occupation.

The petitioner has provided a certified labor condition application and a statement that it will comply with the terms of the labor condition application.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The beneficiary's foreign education has been found by a credentials evaluation service to be equivalent to an associate (two-year) degree in food preparation technology conferred by a United States institution. Counsel asserts that the beneficiary is currently enrolled in a four-year program in hotel and restaurant management at a United States institution. Counsel has provided no evidence of the beneficiary's academic progress. Accordingly, it is concluded that the petitioner has not shown that the beneficiary qualifies to perform the duties of a specialty occupation based upon education alone.

The beneficiary had 12 years of employment experience at the time the visa petition was filed. The petitioner has not shown that this experience was experience in a specialty occupation or that it is sufficient to overcome the beneficiary's lack of a baccalaureate degree in a specialized area.

The beneficiary is not a member of any organizations whose usual prerequisite for entry is a baccalaureate degree in a specialized area. The record contains no evidence that the beneficiary holds a state license, registration, or certification which authorizes her to practice a specialty occupation. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the beneficiary qualifies to perform services in a specialty occupation.

The term "specialty occupation" is 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 to fully perform the occupation in such 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.

The duties of the proffered position are described in pertinent part as follows:

Estimate cost and equipment requirements. Menu planning. Development and implementation of marketing activities. Planning and ordering food supplies. Review all

applicable financial transactions. Monitor budget.
Coordinate food preparation and service activities.
Directing hiring and assignments.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the proffered position. In addition, the petitioner has not shown that similar firms require the services of such individuals in parallel positions.

Counsel asserts that the proffered position is considered a specialty occupation in view of the court ruling in Hong Kong T.V. Video Program, Inc. v. Ilchert, 685 F. Supp. 712 (N.D. Cal. 1988), which found a company president position professional based on the complexity of its duties alone even though a degree is not required. The Service does not consider itself bound by this decision outside the Northern District of California. In addition, Hong Kong is inapplicable here because it dealt narrowly with a company president with both extensive experience and significant authority over individuals.

In the court case, the beneficiary was the president of the largest Asian-language video distribution company in the United States, which under the beneficiary's guidance had achieved a gross annual income of approximately \$10 million within seven years of the company's founding. In addition, he had direct oversight over 70 employees and over 700 sublicensees, and his salary was \$140,000 per year. He was a corporate executive who made decisions at the senior management level of an extensive business operation. He was responsible for corporate strategy, budgeting, financial planning, marketing and promotional strategy, transportation and distribution of goods, product and inventory control, contractual negotiation and determination, and legal involvement with "pirate" firms involved in illegally duplicating and selling the company's products.

Unlike here, the beneficiary supervised managers who, in turn, had supervisors and assistants reporting to them. The supervisors and assistants, in turn, had employees such as foremen, blue-collar workers, secretaries, receptionists, clerks, and sales assistants reporting to them. The beneficiary of this petition will not serve as a company president. The petitioner has not shown that the responsibilities of the proffered position are as extensive or complex as those of the beneficiary in Hong Kong.

Counsel has also cited several decisions of the Service and three other decisions of the federal courts. Counsel has not demonstrated that these decisions are relevant to the facts and issues of this proceeding.

Counsel has also provided a letter from an academic expert who asserts that the usual requirement for positions such as the proffered position is a baccalaureate degree in a specialized field of study. The writer has provided no evidence in support of this assertion. For example, he has not indicated the number or percentage of "fine dining restaurants" which require such qualifications.

A review of the Department of Labor's Occupational Outlook Handbook, 2000-2001 edition, at page 78 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a restaurant manager. Some restaurant managers are promoted from the ranks of restaurant workers. Others hold baccalaureate or associate degrees in restaurant management or other fields of study. In view of the foregoing, it is concluded that the petitioner has not demonstrated that the proffered position is a specialty occupation within the meaning of the regulations.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The appeal is dismissed.