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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



File: WAC-00-097-53884

Office: California Service Center

Date: 11 APR 2002

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, Acting 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 chain of ethnic specialty restaurants with 85 employees and an approximate gross annual income of \$4.7 million. It seeks to extend the employment of the beneficiary as a manager/administrator for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a statement. Counsel also indicates that a brief and/or additional evidence would be submitted in support of the appeal on or before April 23, 2001. However, as of the date of this decision, no additional material has been submitted to supplement the appeal. Therefore, the record must be considered complete.

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 concluded that the petitioner had not established that the job duties to be performed by the beneficiary can only be performed by an individual with a baccalaureate or higher degree. On appeal, counsel argues that the performance of the proffered position's duties required a level of knowledge associated with the attainment of a bachelor's degree in business administration. Counsel asserts that the previous approval of a petition filed by the petitioner on the beneficiary's behalf was not in error and the employment circumstances had not changed significantly; thereby, warranting approval of the current petition for an extension.

Counsel's statements on appeal are 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 a letter which accompanied the initial I-129

petition, the petitioner described the duties of the offered position as follows:

- \* Oversees, administer[s], supervises and manages multiple restaurants;
- \* Administrator of office functions, operations, management, marketing, personnel and human resources while enforcing corporate standards, policies and quality of service. Build sales and control costs. Identifies operational opportunities; creates and implements plans to address opportunities i.e. marketing, sales, promotion and advertising. Creates and implements plan for departmental sales, profit, personnel and human resources. Coordinates food service activities of the restaurant;
- \* Oversees management of managers and decision making. Provide human resource management for employees. Direct and coordinate activities to implement policies, procedures and practices to be followed by all employees. Develops training programs for staff and all position[s];
- \* Responsible for interviewing and hiring employees, complying with Federal and state hiring requirements and regulations. Implements personnel policies, documents compliance of employee related labor requirements;
- \* Sets up and maintains and develops information data system program through a computerized system of hardware and software to support personnel in accordance with governmental laws and regulations for employees. Maintains a favorable relationship with all company employees;
- \* Supervises and manages cash flow, reservation, payroll and accounting functions of business. Balance cash on hand with the End Day report. Develop and analyze budget data and budget requests to identify areas in which cost reductions can be made;
- \* Develops and maintains compliance program in accordance with laws and regulations. Ensures a safe working environment to reduce risk of injury and accidents. Completes accident reports promptly in the event of an injury;
- \* Directs through subordinates['] activities engaged to implement establishment of services and performing

functions as required. Ensures that proper security procedures are in place to protect employees, customers and company assets;

- \* Responsible for payroll records and management issues, directing and coordinating activities in maintaining records;
- \* Confers with staff and management, reviews records and management system to recommend changes to improve systems;
- \* Responds to customers['] complaints and compliments;
- \* Implements and executes various company programs including accounting procedures, menu changes, marketing strategies, training, developmental processes and risk management programs;
- \* Performs other duties and responsibilities as required or requested;
- \* Performs all duties and responsibilities in a timely and effective manner in accordance with establishes[sic] company policies to achieve the overall objectives of this position.

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.

The Service does not agree with counsel's argument that the position of manager/administrator would normally require a bachelor's degree in business administration. The proffered position appears to combine the duties of a general manager or executive with those of a restaurant or food service manager. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2000-2001 edition, finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a general manager or executive. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background.

A review of the Handbook also 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.

With respect to the counsel's objection to denial of this petition in view of the previous approval of a petition filed by the petitioner on behalf of the beneficiary, this Service is not required to approve applications or petitions where eligibility has not been demonstrated. The record of proceeding, as presently constituted, does not contain a copy of the approved visa petition and its supporting documents. It is, therefore, not possible to determine definitively whether it was approved in error or whether the facts and conditions have changed since its approval. Determinations of eligibility are based on the totality of evidence available to this Service at this time. The Associate Commissioner, through the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. Louisiana Philharmonic Orchestra v INS, 2000 WL 282785 (E.D.La. 2000), aff'd, 248 F. 3d 1139 (5th Cir. 2001), cert. denied, 122 S. Ct.51 (U.S. 2001).

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.

Counsel argues that the nature of the proffered position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree in business administration. However, as noted above, the Handbook does not provide any indication that a baccalaureate degree in a specialized area is required to be

employed as either a general manager or a restaurant manager. As such, it has not been persuasively established that the duties of the proffered position are so 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.

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.