



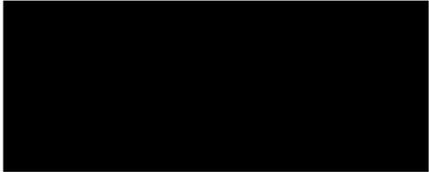
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U.S. Department of Justice

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: EAC-01-201-57049 Office: Vermont Service Center

Date: APR 30 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:



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INSTRUCTIONS:

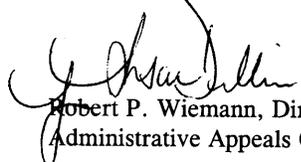
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

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, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a company which manages five McDonalds Restaurants. The petitioner has 14 employees. Each individual restaurant managed by the petitioner has 20-30 employees. The petitioner has a gross annual income of \$519,000. It seeks to employ the beneficiary as an operations manager 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 brief and additional evidence.

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 are so specialized or complex that they can only be performed by an individual with a baccalaureate or higher degree in a specific, specialized field of study.

On appeal, counsel states that the director failed to consider an advisory opinion report in which the evaluator finds that the proffered position qualifies as a specialty occupation. Counsel further states that the director failed to consider evidence that the petitioner normally requires a baccalaureate degree or its equivalent for the proffered position. In support of his statements, counsel submits copies of documents previously submitted by the petitioner.

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:

[The beneficiary's] duties will require her to: oversee and establish corporate goals and policies; supervise managers of individual restaurants who are responsible for the operations of the restaurants, including hiring, firing, and training employees; establish, implement and meet our annual budget and labor needs, strategic planning and marketing to increase our market share and revenues; assure compliance with labor and other laws; be responsible for cash flow, and will work with managers responsible for ordering of goods, establishing prices, and working with our accountant to prepare tax returns, coordinate advertising and instigating of community involvement to develop local good will and expand the client base.

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.

Counsel asserts that the director failed to consider an evaluation by [REDACTED] of Global Education Group. [REDACTED] finds that the duties of the proffered position "would require an applicant to hold a minimum of a U.S. Bachelor's degree in Business Administration or related area awarded by a regionally accredited university in the United States or foreign equivalent." [REDACTED] bases this conclusion on the duties of the position as described by

the petitioner. Although [REDACTED] be qualified to evaluate the educational credentials of the beneficiary, she has not provided any credentials setting forth her ability to give expert testimony regarding the question of whether the proffered position qualifies as a specialty occupation. That determination is the province of the Service as set forth within the Immigration and Nationality Act (INA). Therefore, the Service does not accept the evaluation.

In these proceedings, the Service often looks to the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. In this case, the proffered position appears to combine the duties of an administrative services manager with those of a restaurant or food service manager. A review of the Handbook 2002-2003 edition, at pages 24-26 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as an administrative services manager. Educational requirements for administrative services managers vary widely, depending on the size and complexity of the organization. In small organizations, experience may be the only requirement needed to enter a position as an administrative services manager. Administrative services managers are often promoted from within the company based on past performance. Whatever the manager's educational background, it must be accompanied by related work experience reflecting demonstrated ability.

A review of the Handbook at pages 55-57 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 manager positions, particularly self-service and fast food, are filled by promoting experienced food and beverage preparation and service workers.

Counsel states that the petitioner has only employed one other individual in the position of operations manager, and that individual has a bachelor's degree in business administration. In support of this statement, counsel submits that individual's diploma from an Indian institution of higher learning and a copy of the notice approving the H-1B petition filed by Bland Management on behalf of that individual.

With respect to counsel's objection to denial of this petition in view of the approval of a similar petition in the past, 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 previously approved petition and its supporting documentation. 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).

Additionally, 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 duties of the proffered position are 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 baccalaureate degree in a specialized area is required to be employed as either an administrative services 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.