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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: SRC-01-092-52541 Office: Texas Service Center

Date: **DEC 16 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:

INSTRUCTIONS:

This is the decision 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.

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 that 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 that 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
Robert P. Wiemann, Director
Administrative Appeals Office

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

The petitioner is a restaurant with three employees and a stated gross annual income of \$102,773. 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.

On appeal, counsel submits a brief and additional documentation.

Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines the term "specialty occupation" as an occupation 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.

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 shown that the proffered position required a baccalaureate degree in a specific specialty.

On appeal, counsel asserts that the petitioner has always required a bachelor's degree or its equivalent for the proffered position. Counsel further asserts that the requirement of a bachelor's degree for restaurant manager positions is common to the South Florida restaurant industry and also that the proffered position involves such complex duties that it requires a bachelor's degree.

Counsel's assertions 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 the initial I-129 petition, the petitioner described the duties of the offered position as follows:

- * [d]irecting and coordinating operations of restaurant;
- * reviewing financial transactions and monitoring budgets to ensure efficient operation, and to ensure that expenditures stay within budget constraints;
- * [e]stimating food and beverage costs and ordering supplies accordingly;
- * conferring with food preparation, wait staff, and other personnel to plan menus and related activities;
- * directing hiring, training, and assignment of personnel, as well as promotions and dismissals when necessary;
- * investigating and resolving food quality and service complaints.

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 Department of Labor (DOL) has determined in its Dictionary of Occupational Titles (DOT) that the position of restaurant manager requires a bachelor's degree in a specific specialty. However, a reference in the DOL's DOT, Fourth Edition, 1977, standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the DOL in the various editions of the Occupational Outlook Handbook (Handbook). The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an particular job qualifies as a specialty occupation. This is because the Handbook provides specific and detailed information regarding the educational and other requirements for occupations.

The proffered position appears to be that of a food service manager. A review of the Handbook, 2002-2003 edition, at page 56 finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a food service manager. Most food service management companies and national or regional restaurant chains recruit management trainees from 2 and 4-year college hospitality management programs. Food service and 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. While a bachelor's degree in restaurant and food service management provides a particularly strong preparation for a career in this occupation, there is no indication in the Handbook that this degree is the normal minimum requirement for entry into the occupation. Thus, the petitioner has not shown that a bachelor's degree in a specific specialty or its equivalent is required for the position being offered to the beneficiary.

Although the petitioner's vice president stated in a letter dated September 5, 2001, that it is the company's policy to hire only managers with a bachelor's degree, the record does not contain any evidence to corroborate this statement. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In an effort to show that the requirement of a bachelor's degree is standard to the South Florida restaurant industry for restaurant manager positions, counsel submits four letters from owners and managers of other restaurants. All four individuals state that they require a four-year college degree and restaurant management experience. However, not one of these individuals states that the degree must be in a specific specialty such as restaurant management or a related field.

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 in a specific specialty. The duties of this position are no more complex than those normally performed by restaurant managers at chain or franchise restaurants. The DOL, which is an authoritative source for educational requirements for certain occupations, does not indicate in the Handbook that a bachelor's degree in a specific specialty is the minimum requirement for employment as a restaurant manager.

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.

With respect to counsel's objection to denial of this petition in view of the approval of two previous petitions filed in the beneficiary's behalf by the same petitioner, the Service is not required to approve applications or petitions where eligibility has not been demonstrated. The director's decision does not indicate whether he reviewed the prior nonimmigrant petitions, and this record of proceeding does not contain copies of those petitions. If the prior petitions were approved based on the same evidence contained in this record of proceeding, however, the approval of those petitions would have involved gross error. The Service is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988).

Beyond the decision of the director, the record contains insufficient evidence to demonstrate that the beneficiary is qualified to perform the duties of a specialty occupation. The record shows that, although the beneficiary has completed training courses in management, foreign trade, credit and collections, and supervision, he does not hold a four-year baccalaureate degree from any college or university. The credentials evaluator found the beneficiary's training courses and work experience equivalent to a Bachelor's of Business Administration degree with a specialization

in international finance from an accredited U.S. university. However, the record does not contain any corroborating evidence to support this finding such as an evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. 214.2(h)(4)(iii)(D)(1). As this matter will be dismissed on the grounds discussed, this issue need not be examined further.

Additionally, it is noted that the beneficiary has completed six years in the United States in H-1B status. Pursuant to 8 C.F.R. 214.2(h)(15)(ii)(B), an extension of stay may be authorized for a period of up to three years for a beneficiary of an H-1B petition in a specialty occupation. The alien's total period of stay may not exceed six years. 8 C.F.R. 214.2(h)(13)(iii)(A) indicates that an H-1B alien in a specialty occupation who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year. In this case, the beneficiary completed six years as an H-1B temporary worker in the United States on February 1, 2001. There is no evidence in the record to indicate that the beneficiary has resided and been physically outside the United States for the immediate year prior to the filing date of this petition. Therefore, the petition may not be approved for this reason as well.

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.