

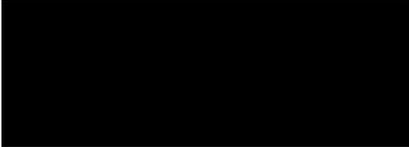


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U.S. Department of Justice
Immigration and Naturalization Service

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



File: SRC-01-195-52703 Office: Texas Service Center

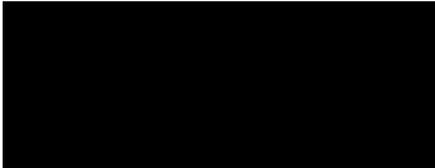
Date: 18 DEC 2007

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 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, 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 gourmet pizza restaurant with four employees and stated gross income of \$145,822. It seeks to employ the beneficiary as a hospitality 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.

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 did not establish that a baccalaureate degree is a minimum requirement for employment in the proffered position. On appeal, counsel argues that the Service ignored expert testimony contained in the record that establishes evidence that the degree requirement is an industry standard for parallel positions among similar organization. Counsel asserts that the nature of the duties of the offered job is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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 that accompanied the initial I-129 petition, the petitioner offered the following description of the duties of the beneficiary in the offered position:

...will assist management in all areas related to the departments of Food and Beverage, such as, accounting, kitchen, restaurant, and other related facilities as to the concept of work flow and cost control. [The

beneficiary] will search, select and train food and beverage personnel. He will select and price menu items, using food and other supplies efficiently, and achieving quality in food preparation and service. [The beneficiary] will be responsible for a growing number of administrative and human resource tasks. He will supervise all related Food and Beverage activities. [The beneficiary] will control costs related to price and quality. [The beneficiary] will establish a criteria for food portion cost control per budget. He will receive and check the content of deliveries, evaluating the quality of meats, poultry, fish, fruits, vegetables, and baked goods. [The beneficiary] will meet with sales representatives from restaurant suppliers to place orders replenishing stocks of tableware, linens, paper, paper cleaning supplies, cooking utensils, and furniture and fixtures. [The beneficiary] will arrange for equipment maintenance and repairs and coordinate a variety of services such as waste removal and pest control. He will investigate and resolve customers' complaints about food quality or service. [The beneficiary] will monitor the actions of employees and patrons on a continual basis to ensure that health and safety standards and local liquor regulations are obeyed.

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 petitioner's description of the duties of the offered job paraphrases the description of the duties of a food service manager as contained in the Department of Labor's Occupational Outlook Handbook, (Handbook), 2002-2003 edition, at pages 55-57. Therefore, the proffered position is considered to be that of food service manager. The Handbook does not list any requirement of a baccalaureate degree in a specific specialty for employment as a food service manager. Some food service managers are promoted from the ranks of restaurant workers. Others hold baccalaureate and associate (two-year) degrees in restaurant and hotel management, institutional food service 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.

The record contains a letter signed by Fay E. Adams, M.A., Director, International Credentials, at Johnson & Wales University with campuses in a number of cities including Providence, Rhode Island. Ms. Adams reiterates portions of the petitioner's description of the duties of the proffered position, and in her final paragraph concludes the following:

The Bachelor degree in hospitality management is the industry standard for the position of Hospitality Operations Manager, such as the one being offered to [the beneficiary]. A Bachelor degree in Hotel Management would generally prepare a student for an entry-level management trainee position; this position would require a Bachelor degree and a number of years of management experience. The major hotel chains and corporations are requiring a Bachelor degree for management positions such as the one being offered to [the beneficiary].

Ms. Adams' statements reflect the existence of an industry standard requiring a degree in hospitality management (restaurant and hotel management) for employment in management positions with major hotel chains and corporations. This is because the duties of certain management positions in establishments such as nationally renowned restaurants, luxury hotels, and major hotel and restaurant chains and corporations involve overseeing large well-trained staffs in a variety of complex operations. The petitioner is a single gourmet pizza restaurant with four employees and stated gross annual sales under \$146,000, and cannot be considered to be comparable to such establishments. Consequently, the petitioner did not establish that businesses similar to it in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions.

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees for the offered position.

Counsel's assertion that the proffered position is a specialty occupation because its duties are so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree cannot be accepted. The duties of the offered job paraphrase the relatively simple duties of a food service manager position as listed in the Handbook, including such mundane tasks as ordering supplies, checking the contents of deliveries, meeting with sales representatives, and arranging for waste removal and pest control. In addition, counsel has not submitted any documentary evidence that would tend to corroborate this assertion. It was held in Matter of Obaiqbena, 19 I. & N. Dec. 533, 534 (BIA 1988) and Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503 (BIA 1980), that the assertions of counsel do not constitute evidence.

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.