

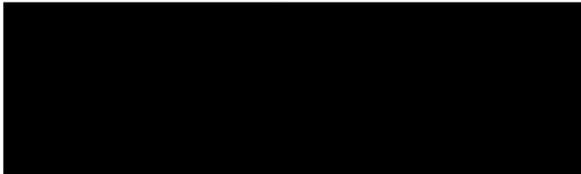


DA

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-01-195-57607 Office: Vermont Service Center

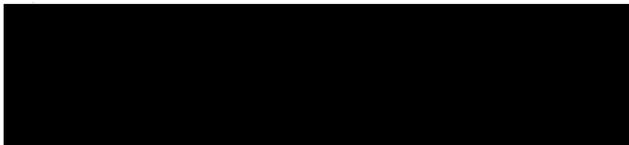
Date: JUL 08 2002

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, 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 food and beverage management business with 20-30 projected employees and a projected gross annual income of \$1.5 million. It seeks to employ the beneficiary as a marketing director 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. Counsel requests that the appeal be remanded to the director for consideration as a motion. The appeal, however, has been forwarded to this office pursuant to 8 C.F.R. 103.3(a)(2)(iv), and there is no provision for our sending an appeal to the Service Center director to be treated as a motion based on the request of the petitioner. Consequently, counsel's request is denied.

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 demonstrated that there was a position and sufficient work available for the beneficiary at an H-1B level. On appeal, counsel states, in part, that in response to the director's request for additional information, the petitioner submitted payroll records showing that it had two employees, in addition to the executive chef's contract. Counsel further states that the proposed duties are so complex that a baccalaureate degree is required. The record contains an expert opinion in support of her argument.

Counsel's statement on appeal that the proffered position is a specialty occupation is 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:

Plan, design, oversees and conducts marketing research to provide insight into economic relationships for products and services offered by new chain of restaurant/clubs to cater to an upscale international clientele. [The beneficiary] will outline policies, sales promotion and special promotional campaigns targeted toward unique clientele of the outlets. Allocate the advertising budget. Review and approve ad copy, promotional materials, menu and interior design choices. Direct research activities to gather information or compilation of statistics pertinent to planning and execution of marketing and promotion campaigns. Analyze results of studies. Prepare reports, interpret market conditions and potential, and make recommendations to management.

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.

First, the Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in hospitality management with an emphasis in marketing or a related field. The proffered position appears to combine the duties of a food service manager with those of a marketing/advertising manager. A review of the Department of Labor's Occupational Outlook Handbook (Handbook), 2002-2003 edition, finds no requirement of a baccalaureate or higher degree in a specialized area 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.

A review of the Handbook also finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a marketing/advertising manager. A wide range of educational backgrounds are considered suitable for entry into marketing and advertising managerial positions. Some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing, but many employers prefer those with experience in related occupations plus a broad liberal arts background. In addition, certain personal qualities and participation in in-house training programs are often considered as significant as the beneficiary's specific educational background. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, 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 such as hospitality management with an emphasis in marketing, for the offered position. Third, 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. 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.

Counsel has provided a letter from an industry expert who states, in part, as follows:

. . . I feel strongly that the requirements of this position are such that it would require no less than a Baccalaureate level Degree or its equivalent, preferably in the field of Food and Beverage or Hospitality Management.

The expert indicates that although it is his opinion that a baccalaureate degree is required for the proffered position, the specialties of food and beverage or hospitality management are only preferred. Such letter is insufficient evidence of an industry standard. The writer has not provided evidence that a baccalaureate or higher degree in a specialized area is required for the proffered position.

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.

Beyond the decision of the director, the petitioner's labor condition application was certified on August 20, 2001, a date subsequent to June 5, 2001, the filing date of the visa petition. Regulations at 8 C.F.R. 214.2(h)(4)(i)(B)(1) provide that before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application. Furthermore, although the record contains an evaluation indicating that the beneficiary holds the equivalent of a bachelor's degree in hospitality management with an emphasis on marketing, the record does not contain any corroborating evidence to support such 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, these issues need not be examined further.

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.