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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-01-041-51749 Office: Vermont Service Center

Date: MAY 14 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 restaurant with nine employees and a gross annual income of \$600,000. It seeks to employ the beneficiary as a management/business analyst 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 duties described by the petitioner did not appear to be so complex as to require a baccalaureate degree. On appeal, counsel states, in part, that as the petitioner is a rapidly expanding business, the services of a management analyst are needed to meet expansion plans. Counsel further states that the petitioner's assistant manager who performs similar duties was also required to hold a baccalaureate degree. Counsel submits letters from industry experts in support of his claim.

Counsel's statement on appeal 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:

- * Study and analyze various factors affecting business operations and prepare reports on a monthly basis for the benefit of management;
- * Achieve the targeted sales fixed by the management;

- * Maintain an updated and accurate record of all inventory and track its use and consumption;
- * Research products, pricing and costing;
- * Upgrade management information and reporting procedures;
- * Implement internal control systems and ensure timely and effective management information network;
- * Study work problems such as organizational changes, communications, information flow, integrated production methods, inventory control and cost analysis;
- * Analyze data gathered, develop information and consider available solutions or alternate methods of proceedings;
- * Ensure maintenance of an adequate and well trained staff;
- * Implement marketing, public relations and sales policies;
- * Interact with end suppliers, caterers, subcontractors and coordinate supplies and quality standards;
- * Manage and maintain efficient stocks of foods and beverages;
- * Manage menu selection, sales performance, pricing, quality control on food, customer service and other critical hospitality functions;
- * Recruit, train and supervise adequate number of workers and attend to various administrative aspects of the business;
- * Ensure food preparation is as per health and sanitation standards and achieve highest possible level of quality standards;
- * Provide professional consulting services;
- * Create new business plans, financing, budgeting and accounting;
- * Undertake market research analysis, advertising, marketing and new target location as well as publicity;

- * Look after staff management and training as well as hiring and firing of personnel;
- * Prepare management reports and competitor analysis;
- * Make recommendations on new ventures;
- * Manage menu selection, wine selection, restaurant management, interior designing and banquet 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 beneficiary is a management analyst, an occupation that would normally require a master's degree in business administration or a related field and at least five years of related experience. Counsel asserts that the Department of Labor has determined that the proffered position is a specialty occupation. However, a reference in the Department of Labor's Dictionary of Occupational Titles (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 Department of Labor 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 occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

In its Handbook, 2002-2003 edition, the Department of Labor (DOL) describes the job of a management analyst as follows:

After obtaining an assignment or contract, management analysts first define the nature and extent of the problem. During this phase, they analyze relevant data, which may include annual revenues, employment, or expenditures, and interview managers and employees while observing their operations. The analyst or consultant then develops solutions to the problem. In the course of preparing their recommendations, they take into account the nature of the organization, the relationship it has with others in that industry, and its internal organization and culture. Insight into the problem is often gained by building and solving mathematical models.

The record reflects that the petitioner, which is in the restaurant business, employs nine persons and has a gross annual income of \$600,000. The business in which the beneficiary is to be employed does not require the services of a management analyst who analyzes data such as annual reports, employment, and expenditures, and interviews managers and employees while observing their operations. Furthermore, there is no evidence that the position offered includes complex or advanced duties such as building and solving mathematical models, or that the position requires an individual with a knowledge of sophisticated analysis techniques normally associated with the duties of a management analyst. It is also noted that the proffered position does not require a master's degree in business administration which is the usual requirement for a management analyst position, as stated in the Handbook.

The duties that the petitioner endeavors to have the beneficiary perform are similar to the duties that a food service manager and a market manager would execute in a small business establishment. In contrast to the description of a management analyst, in its Handbook, the DOL describes the position of a restaurant manager, in part, as follows:

In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently, and achieving quality in food preparation

and service, managers are now responsible for a growing number of administrative and human resource tasks.

In addition to their regular duties, food service managers have a variety of administrative responsibilities. Although much of this work is delegated to a bookkeeper in a larger establishment, managers in most smaller establishments, such as fast-food restaurants, must keep records of the hours and wages of employees, prepare the payroll, and fill out paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid on a regular basis. In addition, managers in full-service restaurants record the number, type, and cost of items sold to evaluate and discontinue dishes that may be unpopular or less profitable.

The DOL also describes the position of a market manager, in part, as follows:

Marketing managers develop the firm's detailed marketing strategy . . . they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets--for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the customers are satisfied . . . they monitor trends that indicate the need for new products and services and oversee product development.

The types of duties the petitioner ascribes to the beneficiary fall within the scope of a food manager position and a marketing manager position rather than a management analyst position. For example, the petitioner states that the beneficiary will "[e]nsure maintenance of an adequate and well trained staff, [i]nteract with end suppliers, caterers, subcontractors and coordinate supplies and quality standards, [m]anage and maintain efficient stocks of foods and beverages" and "[m]anage menu selection, sales performance, pricing, quality control on food, customer service and other critical hospitality functions." Training staff, interacting with caterers, maintaining efficient stocks of foods, and managing menu selection are not duties normally associated with a management analyst. 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, although counsel argues that the petitioner's past hiring practices indicate that it normally requires a baccalaureate degree in hotel and restaurant management or a related field for the proffered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. As with employment agencies as petitioners, the Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F.3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if the Service was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id. at 388.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree for its manager positions, the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though the petitioner has required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty.

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.

¹ The court in Defensor v. Meissner observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." Supra at 387.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. The job fits the description of a food manager and a marketing manager, rather than a management analyst. According to the DOL in its Handbook, most food management companies and national or regional restaurant chains recruit management trainees from 2 and 4-year college hospitality programs. In addition, they also hire graduates with degrees in other fields who have demonstrated interest and aptitude. 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.

A review of the Handbook also finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a marketing manager. A wide range of educational backgrounds are considered suitable for entry into marketing 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. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Counsel has provided two letters from individuals involved in the restaurant industry. Both state that the usual requirement for positions such as the proffered position is a baccalaureate degree in hotel and restaurant management or a related field. Two letters are insufficient evidence of an industry standard. The writers have not provided evidence in support of their assertions. In addition, neither of the writers has indicated the number or percentage of restaurant managers who hold such degrees.

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.