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U.S. Department of Justice
Immigration and Naturalization Service

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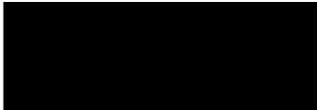
OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: LIN-02-025-52667 Office: Nebraska Service Center

Date: NOV - 7 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: SELF-REPRESENTED

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
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 seafood processor with nine employees and a gross annual income of \$1 million. It seeks to employ the beneficiary as a seafood processing assistant 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, the petitioner's president submits additional information. He also requests oral argument. Oral argument, however, is limited to cases where cause is shown. It must be shown that a case involves facts or issues of law which cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the petitioner's request for oral argument 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 has not demonstrated that the proffered position requires a baccalaureate degree. On appeal, the petitioner's president states, in part, that evidence has been submitted by an industry expert to demonstrate that the proposed duties, which include keeping fish quality high and bacteria contents low, are so specialized that a baccalaureate degree in food science or an equivalent thereof is required. He further states that the petitioner has submitted evidence to demonstrate that two of its previous employees have held degrees, and that businesses similar to the petitioner's have also required college degrees. He additionally states that the position description, which indicates that a high school diploma is preferred for the proffered position, is an older version that was inadvertently submitted and does not correctly reflect the position's current requirements.

The petitioner'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:

Assists plant manager as a production team leader supervising cannery type cold storage workers that receive, head, gut, and slime various fish species. Most of the duty time is spent on slime line directly assisting and performing the same duties as low skilled fish processing workers (77 1/2% of the time). This position requires the person to work in a wet and cold environment.

In addition, monitors HACCP (basic quality assurance-food safety) plans to ensure that fish is being processed to standard (10% of the time). Assists plant manager in weekly one hour training meetings (2 1/2% of the time). Keeps track of production records and inputs them on a computer spreadsheet at the end of the day (10% of the time). High school graduate is preferred.

Salary is DOE with a range of \$12.00 to \$15.00 an hour.

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 the petitioner's argument that the proffered position would normally require a bachelor's

degree in food science or a related field. In its Occupational Outlook Handbook, 2002-2003 edition, at page 516, the Department of Labor (DOL) describes the job of a food processing occupation, in part, as follows:

. . . *fish cutters and trimmers*, also called *fish cleaners*, are likely to be employed in both manufacturing and retail establishments. These workers primarily cut, scale, and dress fish by removing the head, scales, and other inedible portions and cutting the fish into steaks or boneless fillets.

According to the DOL at pages 517-518, most fish cutters and trimmers acquire their skills on the job. In processing plants, workers may advance to supervisory positions or become team leaders. 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 the petitioner argues that it normally requires a baccalaureate degree in food science or an equivalent thereof 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.

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.

In this case, although the petitioner claimed to have hired only individuals with a bachelor's degree in food science or an equivalent thereof for its seafood processing assistant 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.

The record contains four letters from individuals involved in the food processing industry. All state or suggest that the usual requirement for positions such as the proffered position is a baccalaureate degree in food science or an equivalent thereof. Four letters are insufficient evidence of an industry standard. The writers have not provided evidence in support of their assertions. In addition, none of the writers have indicated the number or percentage of seafood processing assistant managers who hold such degrees.

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.