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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

[Redacted]

File: LIN-01-084-53608

Office: Nebraska Service Center

Date: **SEP 25 2002**

IN RE: Petitioner:

Beneficiary:

[Redacted]

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:

[Redacted]

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, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a retailer of food and beverages with approximately 200 employees and a stated gross annual income of \$4 million. It seeks to employ the beneficiary as an operations manager for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

On appeal, counsel submits a brief and additional documentation.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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) further 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 in a specific field of study. The director further determined the petitioner had not established that the

beneficiary's education and work experience are equivalent to a bachelor's degree in a specific field of study.

On appeal, counsel asserts that the offered position is a specialty occupation. Counsel further asserts that the petitioner has submitted sufficient evidence to show that the beneficiary's education and work experience are equivalent to a bachelor's degree in business administration.

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 Service considers the specific duties of the offered position combined with the nature of the petitioning entity's business operations. In the initial I-129 petition, the petitioner described the duties of the position as follows:

[The beneficiary] will work with our management team to ensure effective and efficient distribution of resources. This will entail management of our business system's capability, which reflects the technical sophistication consistent with the needs and budgetary requirements of our organization. The [b]eneficiary will conduct his responsibilities through a process of reviewing and analyzing reports, records, and directives in order to confer with management to obtain business processing requirements.

After analyzing the company's workload requirements and data processing requirements, the [b]eneficiary will recommend insights that contribute to the overall strategic management and facilitation of company objectives. This will encompass generating fundamental reports, create high-level test data and execute test plans. Drawing on his high level of business knowledge, he will develop a thorough knowledge of the company's business operations, including knowledge of resource allocation and usage, as he directs the management of the organization.

Throughout this process, the [b]eneficiary will interact with management, responding to questions, comments and criticisms, and modifying business objectives to address concerns raised. The [b]eneficiary will confer with the President and Chief Executive Officer involved with proposed projects to ensure cooperation, review project feasibility studies, establish work standards, and prepare progress reports to inform management of status and deviation from goals.

The petitioner provided the following breakdown of the beneficiary's day-to-day responsibilities as operations manager:

- * Analysis of the company's workload requirements and specification - 25%
- * Evaluation of interface feasibility between employee attributes and requirements - 20%
- * Review of the business system needs - 30%
- * Management of managerial professionals - 15%
- * Preparation of reports and studies - 10%

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 Service does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in business administration or a related field. The petitioner is a retail provider of food and beverage services to a broad range of clientele. It wishes to employ the beneficiary as its operations manager. According to the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at page 87, *general and operations managers* plan, direct, or coordinate the operations of companies or public and private sector organizations. The duties include formulating policies, managing daily operations, and planning the use of materials and human resources that are too

diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services.

A review of the Handbook at page 87 finds no requirement of a baccalaureate or higher degree in a specialized area for employment as a general manager or operations manager. Many general managers or operations managers have a bachelor's or higher degree in business administration or liberal arts. In some industries it is possible for individuals without a college degree to work their way up within the company and become managers. Thus, the petitioner has not shown that a bachelor's degree in business administration or a related field is required for the position being offered to the beneficiary.

In an attempt to demonstrate that the degree requirement is common to the industry in parallel positions among similar organizations, the petitioner has submitted 16 newspaper and internet job advertisements for operations managers. However, none of the advertised jobs can be considered to be parallel jobs in similar organizations, since none of the prospective employers are in the food and beverage retail industry.

Counsel asserts on appeal that the regulations do not require that job advertisements submitted to demonstrate an industry standard must be for jobs in the same industry. However, the regulations at 8 C.F.R. 214.2(h)(4)(iii)(A)(2) clearly state that a petitioner must show that the degree requirement is **common to the industry in parallel positions among similar organizations**. As stated above, none of the job ads submitted by the petitioner are for jobs in the food and beverage retail industry, or even in a similar food distribution business. The Service must take into consideration the types of businesses advertising for operations managers in order to make a determination as to whether the prospective employers can be considered to be similar organizations.

While counsel asserts that the petitioner requires a bachelor's degree in business administration, finance, management, or a related analytic or scientific discipline for the offered position, the petitioner has not provided any evidence to show that it requires a bachelor's degree in a specific field of study as part of the hiring process, such as copies of previous job announcements or public advertising for open positions.

The petitioner further states that its two previous operations managers have bachelor's degrees in business administration and economics respectively. Although the petitioner's past hiring practices suggest that it prefers to hire individuals with a bachelor's degree for the offered position, the petitioner's reasoning is problematic when viewed in light of the statutory definition of specialty occupation. 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 were 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, the petitioner's description of the job duties is vague and gives little indication as to their actual level of complexity or the beneficiary's actual day-to-day activities. It is not possible to determine from this description of the job duties 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 a specific field of study.

Additionally, while counsel states that the beneficiary will supervise "managerial professionals," the petitioner has not provided the names of these individuals and their educational credentials. Nor has the petitioner provided an organizational chart showing the management structure of the company and the beneficiary's position within that structure.

In a letter which accompanied the petition, the petitioner stated that "the position of Operations Manager requires a theoretical and practical application of acquired highly specialized knowledge." However, the petitioner has not submitted any independent evidence to corroborate its 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). Thus, the petitioner has not demonstrated that the nature of the beneficiary's proposed duties is so specialized and complex that

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 knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

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.