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U.S. Department of Homeland Security
Citizenship and Immigration Services

*ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536*



FILE: EAC-02-073-50200

OFFICE: VERMONT SERVICE CENTER

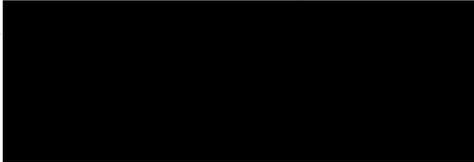
DATE: **DEC 24 2003**

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:



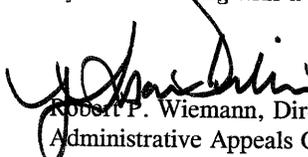
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a food service company that employs nine persons and has a gross annual income of \$400,000. It seeks to employ the beneficiary as a restaurant manager. The director denied the petition because the petitioner failed to establish that the position qualified as a specialty occupation.

On appeal, counsel submits a brief and additional and previously submitted evidence. Counsel states, in part, that the position qualifies as a specialty occupation.

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 for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

[A]n 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.

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's letter, dated November 23, 2001, described the beneficiary's duties as follows:

[The beneficiary] will have a range of responsibilities such as coordinating [the] food service activities of the restaurant, estimating food and beverage costs and requisitions or purchases [of] supplies, conferring with food preparation and other personnel to plan menus and related activities, directing [the] hiring and assignment of personnel, and investigating and resolving food quality and service complaints.

The letter stated that candidates must possess, at minimum, a bachelor's degree in hotel and restaurant management and have work experience. The letter further claimed that, without this level of educational attainment and the skills developed through experience, the petitioner could not trust the position's major responsibilities to any other employee.

On April 11, 2002, the director sought additional information. The director stated that the initial job description did not establish convincingly that the position qualifies as a specialty occupation. Therefore, the director sought evidence that would show that the petitioner hires candidates holding baccalaureate degrees in a specific field of study as a standard minimum requirement for the position. In addition, the director requested a list of persons currently employed in the position, identifying the employees' degrees and fields of study.

In response, the petitioner submitted a letter, dated May 1, 2002. The letter maintained that the owner and manager of the restaurant possess a bachelor's degree in administration and that the former manager also held a bachelor's degree in commerce. The letter claimed that, by hiring a candidate with a strong

academic background and professional experience, it would increase the probability of attaining the company's objective: optimizing efficiency and maximizing profitability. The letter further stated that candidates must possess a bachelor's degree because the restaurant manager would be accountable for the company's performance. Moreover, the letter reported the following additional job duties:

1. Handle all accounting functions such as accounts payable, accounts receivable, payroll and general ledgers.
2. Submit all required tax reports to the IRS, Social Security Administration and to the Comptroller of the State of Maryland.
3. Comply with the franchise agreement with Manchu Wok in promoting and advertising the restaurant.
4. Attend yearly conventions in the United States and abroad to promote public relations and acquire new ideas in the restaurant business.
5. Learn and master rules and regulations to be able to pass the yearly test for Certified Food Service Manager, a certification required in the State of Maryland.

Finally, the letter stated that the company wouldn't entrust the duties of the position to a candidate who did not possess a bachelor's degree and experience in the industry.

On June 17, 2002, the director denied the petition, finding that the offered position did not qualify as a specialty occupation. The director stated that, in response to the request for additional information, the petitioner submitted two letters signed by Mr. Godofredo Tinio, Jr., stating that the former manager held a bachelor's degree in commerce. The director noted that the beneficiary holds a bachelor's degree in hotel and restaurant management, and that the petitioner did not require the prior manager to hold a degree in hotel and restaurant management. The director stated that the petitioner's letter, dated May 1, 2002, stated additional job responsibilities. The director determined that the nature of the duties of the initial job description and the duties added subsequently, did not appear to be so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate.

On appeal, counsel claims that the petitioner has established that the position qualifies as a specialty occupation.

Counsel claims that the petitioner established the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) - that a baccalaureate or higher degree or its equivalent is the minimum for entry into the particular position. Counsel claims that Associate Professor

Marcel R. Escoffier from Florida International University, School of Hospitality Management, who is also a consultant with Josef Silny & Associates, opined that a degree in hotel and restaurant management is a requirement for a successful candidate for the offered position. Moreover, counsel states that the petitioner, a quick service restaurant chain founded in 1980, offers a menu that includes a wide variety of authentic Chinese dishes, such as Cantonese, Szechuan, Hunan, and Mandarin. Counsel alleges that the petitioner requires candidates to possess "at least a baccalaureate degree in any field, or its equivalent, to allow such [an] individual to perform the more complex and unique tasks required by overseeing diverse restaurant operations to ensure professionalism and quality of work."

Counsel's assertions are without merit. In the first place, Associate Professor Marcel R. Escoffier's statement, although pertinent, lacks independent corroborating evidence. Second, Citizenship and Immigration Services (CIS) looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation.

The 2002-2003 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) is instructive in determining whether a position requires a baccalaureate or higher degree or its equivalent for entry into the occupation. On pages 55-57, the *Handbook* discloses that the beneficiary's duties parallel those performed by food service managers. For example, the *Handbook* explains that food service managers recruit, interview, hire, and fire employees; select successful menu items; and on a daily basis, estimate food consumption, place orders with suppliers, and schedule the delivery of fresh food and beverages; arrange for equipment maintenance and repair; coordinate services such as waste removal and pest control; oversee employee training; schedule the work hours of employees; supervise the kitchen and dining rooms, such as overseeing food preparation and cooking; and investigate and resolve customers' complaints about food quality or service. In addition, similar to the beneficiary's duties as described in the petitioner's letter, dated May 1, 2002, the *Handbook* reports that, in small establishments, food service managers keep records of the hours and wages of employees, prepare the payroll, and fill out all paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws.

With respect to the qualifications, training, and advancement of food service managers, on pages 56-57 of the *Handbook*, the DOL states that food and restaurant chains prefer to hire people with

degrees in restaurant and institutional food management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions, the *Handbook* explains, are filled by promoting experienced food and beverage preparation and service workers. The *Handbook* also mentions that most restaurant chains and food service management companies have rigorous training programs for management positions.

Thus, according to the *Handbook*, candidates for the offered position would not be required to possess a bachelor's degree in a specific specialty. Accordingly, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel maintains that the petitioner has established that its particular position is so complex or unique that it can be performed only by an individual with a degree, and that 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. Counsel asserts that the petitioner's restaurant is specialized and operates at one location; consequently, its business requires theoretical knowledge and management skills that are more unique, complex, and intricate than the knowledge and skills required to operate ordinary food chains. Counsel claims that the hiring requirements of restaurant managers employed at a specialized restaurant are different from, and are far higher, than the hiring requirements of staff or crew at an ordinary food chain. Counsel maintains that candidates must possess a bachelor's degree to attain the theoretical foundation and practical application of specialized knowledge of the processes involved in the restaurant business. Counsel refers to the petitioner's letter, dated May 1, 2002, to reaffirm that the company requires candidates to hold a bachelor's degree to optimize its efficiency and maximize its profitability. And, counsel cites *Unico Amer. Corp. v. Watson F. Supp.*, Case No. CV 89-6958 C.D. Cal. March 19, 1991, to state that the Immigration and Naturalization Service (INS), now CIS, should give deference to the employer's view based on the nature of its business, the clientele it serves, and the functions of the job offer, and should not rely simply on a standardized classification system. CIS does not rely on a standardized classification system to determine whether an occupation qualifies as a specialty occupation. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation.

Counsel's claims are without merit. The *Handbook* reveals that the beneficiary's duties are performed by food service managers, and

that although some employers hire candidates with degrees in restaurant and institutional food management, most employers often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Whereas, other employers promote within their companies.

The petitioner has not submitted evidence that would show that the degree requirement is common to the industry in parallel positions among similar organizations.

The record shows that the petitioner claims that it normally requires a degree or its equivalent for the position. For example, the petitioner's letter, dated May 1, 2002, maintains that the owner and manager of the restaurant possesses a bachelor's degree in administration, and that the former manager held a bachelor's degree in commerce. The petitioner's claim is without substance; 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. CIS 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 baccalaureate or higher 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 CIS 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 baccalaureate or higher degrees. *See id.* at 388. As previously discussed, a specialty occupation requires a bachelor's degree in a specific specialty. The *Handbook* reveals that the offered position would not require a bachelor's degree in a specific specialty.

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.

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." *See id.* at 387.

ORDER: The appeal is dismissed. The petition is denied.