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

DA

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

[REDACTED]

File: LIN-01-179-50499 Office: NEBRASKA SERVICE CENTER Date: 11/24/2003

IN RE: Petitioner: [REDACTED]
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)

ON BEHALF OF PETITIONER:

[REDACTED]

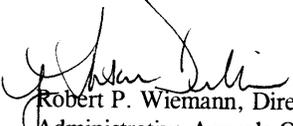
INSTRUCTIONS:

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 Bureau of Citizenship and Immigration Services (Bureau) 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, Nebraska Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted. The previous decision of the AAO will be affirmed.

The petitioner is a Chinese restaurant franchise with approximately 3000 employees and an approximate gross annual income of \$200 million. It seeks to employ the beneficiary as a manager of operations 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 had provided additional information in support of the appeal.

The AAO dismissed the appeal reasoning that the petitioner had not persuasively established that the proffered position is a specialty occupation within the meaning of the regulations.

On motion, counsel states, in part, that T.G.I. Fridays and Harrah's, restaurants that are similar in size to the petitioner, both require a four-year college degree for their restaurant manager positions. Counsel submits evidence in support of his claim.

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 nonimmigrant classification to qualified 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 a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and 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.

Pursuant to section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), to qualify as an alien coming to perform services in a specialty occupation the beneficiary must hold full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. In addition, the beneficiary must have completed the degree required for the occupation, or have experience in the specialty equivalent to the completion of such degree and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Counsel's statement on motion is not persuasive. The Bureau 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 Bureau considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Coordinates food services activities of restaurant. Assesses & analyzes the management of food and beverage product objectives. Identifies problems & makes recommendation for cause of actions. Develops & implements systems for food and beverage management and delivery systems. Evaluates and controls food and labor costs. Insures involvement of all employees on cost control. Maintains overall responsibility for developing and implementing integrated marketing programs and strategies to ensure increasing sales, profitability, and market share for the assigned location. Monitors financial status of the restaurant; plans and takes corrective action; reviews store's annual budget with Area Manager/Operations and proposes adjustments based on business trends as needed. Conducts operational effectiveness reviews to ensure functional or project systems are applied and functioning as designed. Organizes and documents findings of studies and prepare[s] recommendations for implementation of systems and procedures to corporate headquarter[s].

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 Bureau does not agree with counsel's argument that the proffered position would normally require a bachelor's degree in hotel and restaurant management or a related field. As stated in the AAO's previous decision, the proffered position appears to combine the duties of a food service manager with those of a marketing manager. A review of the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, at pages 56-57, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a food service manager. 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* at page 28 also finds no requirement of a baccalaureate or higher degree in a specific specialty for employment as a marketing manager. A wide range of educational backgrounds is 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.

Second, although the petitioner claims that it normally requires a baccalaureate degree in hotel and restaurant management or an equivalent for the proffered position, and provides copies of three baccalaureate degrees as evidence, the petitioner's reasoning for such a requirement 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 Bureau 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 Bureau 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 in hotel and restaurant management, or an equivalent thereof, for its manager of operations 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 job advertisements submitted on motion for general manager and corporate program manager positions for T.G.I. Fridays, as well as a restaurant manager for Harrah's, are noted. Although a baccalaureate degree in business is required for the corporate manager position at T.G.I. Fridays, the proffered position is not a corporate manager position. The job advertisement for T.G.I. Fridays' general manager position specifies only that a 4-year college degree is beneficial. No specific field of study is specified, nor is a 4-year degree required. In addition, although the job advertisement for a restaurant manager at Harrah's specifies a bachelor's degree from a 4-year college or university, no specific field of study is

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.

designated. In view of the foregoing, the petitioner has not presented persuasive documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to the petitioner. 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 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 decision of the AAO dated May 17, 2002, is affirmed.