

DA

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

**identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy**

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

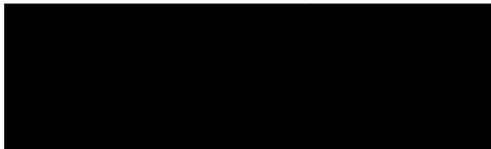


File: WAC 02 149 50577 Office: CALIFORNIA SERVICE CENTER Date: **OCT 14 2003**

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)

ON BEHALF OF PETITIONER:



**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 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 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, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a franchise restaurant with approximately 20 employees, and a gross annual income between one and two million dollars. It seeks to employ the beneficiary as a general manager for a period of three years. The director determined that the proffered position failed to qualify as a specialty occupation.

On appeal counsel submits a brief. Counsel asserts that the proffered position qualifies as a specialty occupation, and that the duties of the offered position are akin to those of a General Manager or Top Executive, and Marketing Manager.

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 Immigration and Nationality Act (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:

an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field 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 AAO does not simply rely on a position's title 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 AAO considers. The beneficiary's job

responsibilities were detailed with the filing of the I-129 petition:

We wish to employ [the beneficiary] with our facility[,] on a temporary basis[,] in the position of General Manager at the rate of \$22.76 per hour. In this position, [the beneficiary] will have a range of responsibilities relating to restaurant management. [The beneficiary :] will direct and coordinate activities involved in [the] production, sale, and distribution of restaurant products[;] will determine [the] variety and quantity of restaurant products to be produced according to orders and sales projections[;] will develop [the] budget for [the] restaurant operation, utilizing experience and knowledge of current market conditions[;] will direct sales activities, following standard business practices[;] will plan product distribution to customers and negotiate with suppliers to arrange purchase and delivery of restaurant supplies[;] and will be responsible for hiring and discharging employees. This work requires knowledge of basic principles of management based on standards of management practice. This position is a demanding one requiring the skills of a professional manager with at least a Bachelor's Degree in Hotel and Restaurant Management or a related field.

Subsequent to the filing of the I-129 petition, the director requested additional evidence. Specifically, the director requested a detailed job description with an allocation of the amount of time to be spent on each duty, the number of hours to be worked per week by the beneficiary, the minimum education/training required for the position, evidence that the proffered position qualified as a specialty occupation, a description of the petitioner's business operation, and documentation establishing the beneficiary's educational qualifications.

In response to the director's request, counsel provided the following job description:

**Job Description:**

[The beneficiary's] specific job duties, the percentage of time to be spent on each duty, level of responsibility, hours per week of work, types of employees supervised will be as follows:

- Directs and coordinates activities involved in [the] production, sale, and distribution of restaurant products (8 - 10 hours/week);

- [D]etermines [the] variety and quantity of restaurant products to be produced according to orders and sales projections (8 - 10 hours/week);
- [D]evelops [the] budget for [the] restaurant operation, utilizing experience and knowledge of current market conditions (8 - 10 hours/week);
- [D]irects sales activities, following standard business practices (8 - 10 hours/week);
- [P]lans production distribution to customers and negotiate[s] with suppliers to arrange [the] purchase and delivery of restaurant supplies (6 - 8 hours/week); and
- [I]s responsible for hiring and discharging employees (4 - 6 hours/week).

[The beneficiary] will wo[r]k between 40 and 60 hours per week and will supervise a total of 20 employees: six (6) cooks, two (2) bookkeepers, and twelve (12) waiters and waitresses. This work requires knowledge of basis principles of management based on standards of management practice. This position is a demanding one requiring the skills of a professional manager with at least a Bachelor's Degree or its equivalent in 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 qualify the offered position as a specialty occupation. The job responsibilities to be assigned to the beneficiary are similar to the duties of a food service manager as set forth in the *Occupational Outlook Handbook*, 2002-03, (*Handbook*) at 55-56. The *Handbook* notes that a bachelor's degree in restaurant and food service management provides strong preparation for a career in this occupation. Candidates are recruited, however, from two and four year college hospitality management programs, as well as from technical institutes and other institutions offering programs leading to associate degrees or other formal certification. *Id* at 56-57. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

The petitioner also failed to establish any of the remaining three criteria: that a degree requirement is common to the industry in parallel positions among similar organizations, or alternatively that the proffered position is so complex or unique that it can be performed only by an individual with a degree; that the petitioner normally requires a degree or its equivalent for the position; or 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.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

Counsel seeks to expand the duties of the proffered position in his brief supporting the petitioner's appeal. Counsel asserts, for the first time, that the beneficiary will plan, coordinate and direct operations not only at the present business location, but at future sites as business expands. Counsel also contends that the beneficiary must have an understanding of the global economy since the beneficiary will provide information and reports to its Japanese owner. The petitioner must establish that the position offered to the beneficiary at the time the I-129 petition was filed is a specialty occupation. See *Matter of Michelin Tire*, 17 I&N Dec. 248,249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. Neither counsel nor the petitioner may now change the title of the position or duties associated with it while the petition is pending.

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 and the appeal shall accordingly be dismissed.

**ORDER:** The appeal is dismissed.