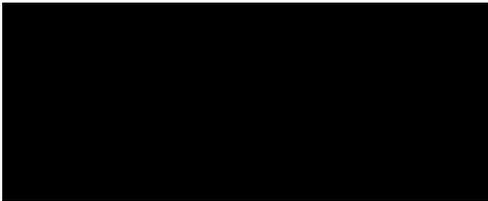




U.S. Citizenship
and Immigration
Services



FILE: LIN 01 111 51264 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

JUN 1 2014

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a fast food restaurant chain that seeks to employ the beneficiary as a pilot manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; (5) the petitioner's motion to reconsider; (6) the director's decision affirming the

denial of the petition; and (7) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a pilot manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's February 8, 2001 letter in support of the petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: recruiting and training operators for new restaurants; introducing the new concept of Japanese fast food; creating a proper image through excellent service and price with high standard food quality; building relationships with local suppliers; assisting the regional general manager in supervising the stores and their managers in the region; assessing and evaluating the management of all product and services objectives; identifying potential problems and opportunities and making recommendations for an appropriate course of action; developing systems for the periodic review of marginally profitable products; evaluating marketing programs against performance objectives; consulting with employee relations staff to assure maximum manpower utilization and development; establishing well-defined employee performance standards; and reviewing and evaluating competitive products, programs and marketing strategies. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in hotel and restaurant management.

The director found that the proffered position was not a specialty occupation. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for entry into a restaurant management position was not a baccalaureate degree or its equivalent in a specific specialty. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states that the director overlooked the fact that the beneficiary would not be managing one restaurant, but would be overseeing four to six restaurants. Counsel also states that the proffered position combines the duties of a food service manager with a market research analyst. According to counsel, the proffered position is a "Job Zone 4" occupation (referring to the Department of Labor's *O*Net*), which requires a degree. Counsel states further that the *Dictionary of Occupational Titles (DOT)* assigns the position an SVP rating of 7, which according to counsel, requires a degree to enter into the position. Finally, counsel states that the *Handbook* supports the petitioner's position that a degree is required for entry into this field.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree.

Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms

"routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO concurs with counsel that the proffered position is that of a food service manager and a market research analyst, although the AAO notes that the position also has elements of a marketing manager. The AAO does not concur with counsel that all of these positions require a baccalaureate or higher degree, or its equivalent, in a specific specialty.

Counsel's reference to and assertions about the relevance of information from *O*Net* and the *DOT* are not persuasive. Neither the *DOT's* SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

According to the *Handbook*, a wide range of educational backgrounds is suitable for preparing to be a marketing manager. For market research jobs, a master's degree is generally the minimum requirement for entry into the field. Although counsel asserts that the *Handbook* indicates that a bachelor's degree in a specialized area is required for food service managers, in fact it clearly states that food service and restaurant chains "often hire graduates with degrees in other fields" than restaurant management. [Emphasis added] There is no requirement for a degree in a specific specialty for two of the three positions most like the proffered position. While a market research analyst would be considered a specialty occupation that requires a master's degree for entry, the proffered position does not include enough elements of that position to qualify as a specialty occupation on that ground alone.

Regarding parallel positions in the petitioner's industry, the petitioner submitted Internet job postings for food service managers. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. Thus, the advertisements have little relevance.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states that the director erred in determining that the degrees of all of the other pilot managers were not in a specific specialty. The three pilot managers have degrees in hospitality management, business administration of tourism and hotel and restaurant management. Counsel asserts that the director's decision was too narrow in determining what constitutes a specific specialty. The AAO concurs with the director that the three degrees are not all in a specific specialty related to the proffered position. A degree in tourism is not like a degree in restaurant management.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

Beyond the decision of the director, the AAO notes that the labor condition application was certified on April 22, 2001, two months after the petition was filed on February 22, 2001. The regulations state, "Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed." 8 C.F.R. § 214.2(h)(4)(B)(1). CIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(12).

In addition, even if the position had been determined to be a specialty occupation, the credentials evaluation submitted by the petitioner indicates that the beneficiary's degree is equivalent to a bachelor's degree in business administration and management. The beneficiary would not be qualified to perform a specialty occupation that requires a degree in restaurant management. For these additional reasons, the petition cannot be approved.

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. The petition is denied.