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U.S. Citizenship
and Immigration
Services

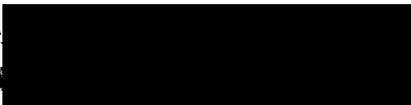


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FILE: EAC 02 003 50014 Office: VERMONT SERVICE CENTER

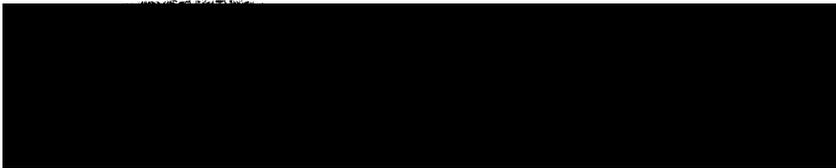
Date: JUN 24 2004

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:



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

60 Robert P. Wiemann, Director
Administrative Appeals Office

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 restaurant and pizza business that seeks to employ the beneficiary as a multi-unit 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; and (5) 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 multi-unit manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's September 21, 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: analyzing information related to each store, such as daily sales, patron attendance, labor cost, and food cost; developing and implementing marketing objectives, strategies, and programs designed to increase and improve the petitioner's market share; handling day-to-day accounts of five stores and liaising with the petitioner's accountant; handling the petitioner's sales programs; handling customer complaints; working with management; conducting interviews and maintaining employment records of each manager; terminating employment of store managers when necessary; and ensuring compliance of all stores with safety, environmental, and health laws, codes, and ordinances. The petitioner indicated that a qualified candidate for the job would possess a master's degree in business administration.

The director found that the proffered position was not a specialty occupation because the proposed duties are not so complex as to require a baccalaureate degree. Citing to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, 2002-2003 edition, the director noted that the minimum requirement for general operations manager and restaurant manager positions 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, in part, that the proffered position is similar to the position of "branch manager," as described in the *Dictionary of Occupational Titles (DOT)*, and is assigned an SVP rating of 8, which according to counsel, requires a degree to enter into the position. Counsel further states that the proposed duties, which entail, in part, performing cost/profit analysis and other accounting functions, as well as training the staff in computer systems and technological processes, are so complex that a bachelor's degree in a related field is required. Counsel also states, in part, that the position should be considered a specialty occupation because: due to the high competitiveness of the restaurant industry, many high-caliber educational institutions, such as Cornell School of Hotel Administration, have developed four-year undergraduate programs designed to prepare individuals for duties such as the proposed duties. Counsel submits a copy of the publication entitled *Multiunit Restaurant Productivity Assessment: A Test of Data-envelopment Analysis (DEA)* by Dennis Reynolds, Ph.D. and Gary M. Thompson, Ph.D. in support of his claim, as well as an academic evaluation from Dr. Joseph Wisenblit, Associate Professor, W. Paul Stillman School of Business, Seton Hall University. Finally, counsel states that the petitioner normally requires a bachelor's or higher degree for the proffered position.

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 does not concur with counsel that the proffered position is a specialty occupation. A review of the Top Executives (general managers/operations managers) and Food Service Managers job descriptions in the *Handbook*, 2004-2005 edition, confirms the accuracy of the director's assessment to the effect that, the job duties parallel the responsibilities of these positions. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for general manager/operations manager and food service manager jobs.

Counsel's assertion that the proffered position is that of a branch manager, as described in the *DOT*, is noted. Even if CIS were to conclude that the proffered position is that of a branch manager, however, counsel's reference to and assertions about the relevance of information from the *DOT* are not persuasive. The *DOT*'s SVP rating does not indicate 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 is meant to indicate only the total number of years of vocational preparation required for a particular position. The classification does not describe 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.

Counsel submits a copy of the publication entitled *Multiunit Restaurant Productivity Assessment: A Test of Data-envelopment Analysis (DEA)* by Dennis Reynolds, Ph.D. and Gary M. Thompson, Ph.D., whose goal is to identify the best practices as they exist in the restaurant chain. Counsel states: "Indeed, the development of educational pedagogy and quantitative analysis to address the challenges of a multi-unit operation, clearly signal the level of complexity inherent in this position." Nowhere in this article, however, is there any evidence that the proffered position is so complex as to require a baccalaureate degree in a related specialty. Counsel's personal observations do not constitute evidence in these proceedings. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Regarding parallel positions in the petitioner's industry, the petitioner submitted an Internet job posting for an "Area Coach" to provide "overall leadership and direct supervision of approximately 6-8 Taco Bell restaurants to ensure that each Restaurant General Manager (RGMs) meets or exceeds the Annual Operation Plan established for their individual unit." The posting indicates that, although a bachelor's degree is preferred, an AA degree is acceptable. Furthermore, the posting does not specify a specific field of study for either degree. Thus, the advertisement has little relevance.

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved another, similar petition in the past. Counsel submits an approval notice demonstrating that the beneficiary was granted H-1B status valid from April 16, 2001 to January 31, 2004, for the petitioner, Sinar, Inc. Counsel also submits a cover letter from Sinar, Inc., dated January 23, 2001, indicating that the beneficiary would be managing three convenience stores. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petition was parallel to the proffered position.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether

the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. The AAO is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the AAO nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The record also contains an evaluation from Dr. Joseph Wisenblit, Associate Professor, W. Paul Stillman School of Business, Seton Hall University, who states, in part, that a baccalaureate degree business administration, business management, restaurant management, or an equivalent thereof, is required for positions such as the proffered position. Professor Wisenblit further states that he believes that this requirement is an industry standard. Simply going on record without supporting documentary evidence, however, is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

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: “Evidence was submitted that many of the employees . . . including Mr. Thibault and Ms. Poole, have possessed bachelor’s degrees in the enumerated fields.” The record, however, does not contain any evidence of such degrees or of the petitioner’s past hiring practices and therefore, the petitioner has not met its burden of proof in this regard. *See Matter of Treasure Craft of California, id.* Furthermore, although counsel submits evidence that the petitioner recently hired a multi-unit manager with a master’s degree from Johnson & Wales University, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

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.

Counsel submits a description of the curriculum from an undergraduate program from Cornell School of Hotel Administration, stating that various institutions have developed four-year undergraduate programs designed to prepare individuals for duties such as the proposed duties. The AAO cannot assume, however, that the additional training that the baccalaureate program provides is solely related to the alleged complexity of the proffered position. Simply going on record without supporting documentary evidence is not sufficient to meet the burden of proof in this proceeding. *See Matter of Treasure Craft of California, supra.* 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.

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.