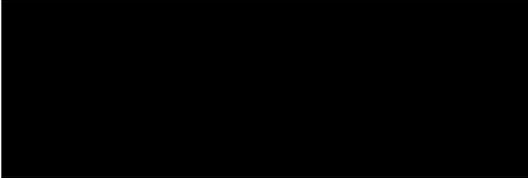


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invasion of personal privacy**



DZ

FILE: EAC 03 060 54914 Office: VERMONT SERVICE CENTER Date: MAY 03 2004

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:



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.

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 company that operates Subway fast food franchises. It seeks to employ the beneficiary as a food service manager. The petitioner, therefore, 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 does not appear to be a specialty occupation. On appeal, counsel asserts that the position is a specialty occupation, and points out that Citizenship and Immigration Services (CIS) has approved a similar petition for a Subway franchise manager submitted at the same time as the instant petition.

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.

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 petitioner's letter of support dated December 9, 2002; (3) the director's request for additional evidence; (4) counsel's letter, dated January 8, 2003, that responds to the director's request; (5) the director's denial letter;

and (6) 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 food service manager for a fast food franchise. Evidence of the beneficiary's duties includes: the I-129 petition; the director's request for further evidence; the petitioner's letter in support of the petition; and counsel's response to the director's request for further evidence. According to the initial petition, the beneficiary would interview, hire and train restaurant personnel; plan, direct or coordinate daily operations, inventory control, and ordering food items for resale; compile work schedules; perform food preparation; create and monitor budget performance, review reports to analyze projections of sales, and profit against actual figures; project further growth in overall sales, market share and opportunities for expansion into new areas; perform all financial procedures, including income and expenses details, maintenance of invoices, categorization of transactions and subsidiary ledgers, cash disbursements, accounts payable, payroll, and cash receipts; comply with all health and safety regulations; and assist central management in developing marketing and sales plans, and planning marketing, advertising, and any special restaurant functions. In the petitioner's response to the director's request for further evidence, counsel provided a breakdown of the time the beneficiary would spend in the areas outlined above, and further explained the various reports that the beneficiary would handle for upper management. The petitioner indicated in its letter of support that at a minimum it required a bachelor's degree in business administration and/or management and one year of work experience.

The director found that the proffered position was not a specialty occupation and referred to the 2002-2003 edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* classification of food service manager. According to the director, the *Handbook* indicated that, although food service and restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. The director also noted that some food service manager positions, particularly self-service and fast food, can be filled by promoting experienced food and beverage preparation and service workers. 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 asserts that CIS is being inconsistent in its application of the law since because CIS approved another petition submitted by the petitioner for an identical food service manager position. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the assertions by counsel are not sufficient to enable the AAO to determine whether the original H-1B petition was approved in error.

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, CIS 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. CIS 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 CIS 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).

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. As correctly noted by the director, the *Handbook* does not establish that the minimum requirement for entry into the proffered position is a baccalaureate degree in a specific specialty. While employers prefer to hire individuals with food services degrees, they also employ individuals with other degrees who have demonstrated aptitude and interest in the job. As previously noted, 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. Without more persuasive evidence, the petitioner has not established that a baccalaureate degree in a specific specialty is required for entry into the proffered position.

With regard to parallel positions in similar fast food franchises, the petitioner did not submit any further documentation, such as vacancy announcements for food service managers at other fast food franchises. 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. The petitioner stated in its letter of support that it was opening two new Subway franchises in the Pentagon building. On appeal, it also indicates that its president is the development agent for Subway franchises in four states. Nevertheless, the petitioner provided no further documentation on the academic credentials of any current or previous food service managers in its other franchises. Although the petitioner has indicated that it requires a bachelor's degree in business administration as the minimum academic credential for entry into the position, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence, the petitioner has not met this criterion.

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 of the position appear to be routine and similar to duties performed in any fast food franchise. The fact that the duties are varied does not necessarily make them either specialized or complex. Without more persuasive evidence, the petitioner has not established the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.