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U.S. Citizenship
and Immigration
Services

DA



FILE: WAC 03 204 50349 Office: CALIFORNIA SERVICE CENTER Date: NOV 01 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 Chinese food chain that seeks to employ the beneficiary as a franchise operations analyst. 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 petitioner did not provide evidence of an approved Labor Condition Application (LCA) predating the filing of the I-129 petition; the proffered position did not qualify as a specialty occupation; and the beneficiary did not qualify to perform the duties of a specialty occupation. On appeal counsel asserts that: a valid LCA was obtained; the proffered position qualifies as a specialty occupation; and the beneficiary is qualified to perform the duties of a specialty occupation.

The first issue to be discussed in this proceeding is whether the petitioner had obtained an approved LCA prior to filing the Form I-129 petition.

The director informed the petitioner that the LCA filed with the Form I-129 petition was not legible and requested another copy. In response to that request, the petitioner obtained a new LCA that was certified subsequent to the filing of the Form I-129 petition. The AAO notes, however, that the record does indeed contain an LCA for the proffered position certified prior to the filing of the Form I-129 petition. Though the file copy of the LCA is somewhat faint, it is clearly legible and satisfies the LCA filing requirement. The director's decision to the contrary is, accordingly, withdrawn.

The second issue to be discussed is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of 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 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:

[A]n occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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.

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 are 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) the 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) the Form I-290B with counsel’s brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a franchise operations analyst. Evidence of the beneficiary’s duties includes the Form I-129 petition with attachment, and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would: establish a franchise format and work with consulting firms to establish expansion methods (40 percent of the time); analyze competitor’s locations, prices, menus, and other data to determine market access and reasonableness of the petitioner’s services (20 percent of the time); investigate consumer attitudes, preferences and dining trends, and evaluate and implement promotional strategies (20 percent of the time); and analyze research results and prepare reports on a weekly/annual basis (20 percent of the time). These duties were described in greater detail in the petitioner’s response to the director’s request for evidence. The petitioner requires a minimum of a bachelor’s degree in hotel and restaurant administration for entry into the proffered position.

The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook (Handbook)* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are varied, but essentially those noted for top executives/general and operations managers, with some additional marketing responsibilities, not food service managers as determined by the director. The *Handbook* notes that the formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor’s or higher degree in business administration or liberal arts. Other executive positions, however, are filled by promoting experienced, lower level managers.

Thus, it is possible to obtain a position as a general or operations manager without a college degree by promotion from within the organization based upon performance alone. It is apparent from the *Handbook* that a baccalaureate or higher degree, in a specific specialty, is not the minimum requirement for entry into the offered position. Positions requiring a college degree are filled from a wide range of educational disciplines. The *Handbook* further notes that a wide range of educational backgrounds is suitable for marketing managers/marketing research managers. Many employers prefer a broad liberal arts background for these positions, or a degree in business administration with an emphasis in marketing. A degree in a specific specialty, however, is not required. The petitioner has failed to establish the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner asserts that a degree requirement is common to the industry in parallel positions among similar organizations. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). In support of that assertion the petitioner submitted copies of two job advertisements from Panda Express. First, copies of two job advertisements from a single company are insufficient in scope to establish an industry educational standard for the proffered position. Second, the advertisements submitted are not for parallel positions to that of the position offered to the beneficiary in that the duties of the advertised positions are not sufficiently similar to the duties of the proffered position. The advertisements are, therefore, of little evidentiary value. The petitioner has failed to establish that a degree in a specific specialty is common to the industry in parallel positions among similar organizations.

The petitioner has not established that it normally requires a degree in a specific specialty for the proffered position, and offers no evidence in this regard. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the petitioner has not established that the duties of the offered position are so complex or unique that they can only be performed by an individual with a degree in a specific specialty, or that the duties are so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and (4). The duties are routinely performed by general and operations managers/top executives and marketing managers in the industry with education in a wide range of educational disciplines.

It should further be noted that the petitioner's reference to unrelated petitions approved by CIS will not sustain the petitioner's burden of proof in these proceedings. This record of proceeding does not contain the entire record of proceedings in the petitions referred to by counsel. Accordingly, no comparison of the positions can be made. 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). It warrants noting that Congress intended this visa classification for aliens that are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge. Congress specifically stated that such an occupation would require, as a *minimum* qualification, a baccalaureate or higher degree in the specialty. CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specialty occupation as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created that visa category. In the present matter, the petitioner has offered the beneficiary a position as a franchise operations

analyst. For the reasons discussed above, the proffered position does not require attainment of a baccalaureate or higher degree in a specific specialty as a minimum for entry into the occupation, and approval of a petition for another beneficiary based on identical facts would constitute material error, gross error, and a violation of 8 C.F.R. § 214.2 paragraph (h).

The final issue to be discussed is whether the beneficiary is qualified to perform to duties of the proffered position. The director found that the beneficiary was not qualified to perform the duties of a market research analyst. As noted above, however, the duties of the proffered position are varied, but essentially those noted for top executives/general and operations managers, with some additional marketing responsibilities, not market research analysts. The duties of top executives/general and operations managers are filled by individuals with degrees in a wide range of educational disciplines, and in some instances, by individuals promoted from within an organization who do not possess a baccalaureate level education in any discipline. The beneficiary holds a bachelor's degree in hotel administration from the University of Nevada at Las Vegas, and the petitioner deems that degree acceptable for entry into the proffered position. As previously noted, the offered position is not a specialty occupation. The beneficiary's education does, however, qualify her to perform the duties of the proffered position.

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 and the appeal shall accordingly be dismissed.

ORDER: The appeal is dismissed. The petition is denied.