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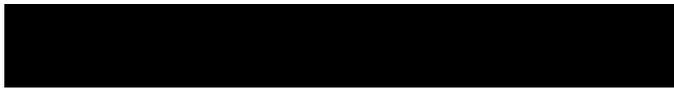


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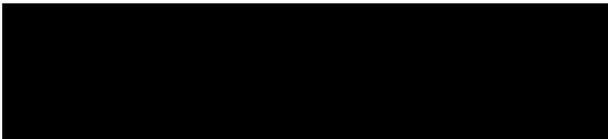
FILE: WAC 03 255 50357 Office: CALIFORNIA SERVICE CENTER Date:

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 materials 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. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner owns and operates a Chinese restaurant. It seeks to employ the beneficiary as a restaurant manager and to classify him 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 on the grounds that (1) the proffered position did not qualify as a specialty occupation and (2) the applicant did not qualify to perform the services of the subject 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) Form I-290B, counsel's appeal brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner owns a Chinese restaurant called [REDACTED] in San Gabriel, California, and seeks to hire the beneficiary as its restaurant manager. In a letter accompanying the petition and in response to the RFE the petitioner listed the duties of the position, and the percentage of time required by each duty, as follows:

- Controlling operating expenses that includes reviewing daily sales and transactions – 20%.
- Building sales through the execution of local and corporate marketing programs – 20%.
- Supervision of food servers and kitchen staff, ensuring that food menu standards are met, and responsible for food presentation – 15%.
- Crew training, motivation and morale; compliance with administrative requirements – 15%.
- Attracting and selecting qualified team members; coaching and developing the restaurant team; ensuring compliance with company policies – 15%.
- Ensuring excellent and pleasant dining service to our guests; ensuring excellence in product quality and customer service; ensuring safety and health requirements are met – 15%.

Counsel asserted that a qualified candidate for the job must have a bachelor's degree in restaurant and hotel management or its equivalent. The beneficiary does not have such a degree, but has worked for nearly 30 years in the food service industry for hotels, caterers and restaurants.

The director determined that the proffered position was not a specialty occupation. The director found that the duties of the position reflected the duties of a food services manager as described in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)*,<sup>1</sup> and that a baccalaureate level of training, as indicated in the *Handbook*, is not the normal, industry-wide minimum requirement for entry into the occupation. The evidence did not show that the petitioner normally requires applicants for the restaurant manager position to have a baccalaureate or higher degree in the field, the director declared, or that the duties of the position and its level of responsibility demonstrated complexity or authority beyond that normally encountered in the occupational field. The director also determined that the beneficiary, whose highest level of education is a secondary school degree in Hong Kong, did not have a combination of education, training, and experience equivalent to a U.S. baccalaureate degree in a specialty occupation, and therefore was not qualified to perform the services of a specialty occupation.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the *Handbook* indicates a degree is required by the industry; 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.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*,

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<sup>1</sup> As described in the *Handbook*, 2004-05 edition, at page 42: "Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers . . . . [T]hey oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment, and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training."

764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel quotes an excerpt from the *Handbook* that restaurants "often hire graduates with degrees in other fields who have demonstrated interest and aptitude." This quotation, counsel asserts, supports the petitioner's contention that a restaurant the size of [REDACTED] - which the petitioner asserts has over 90 employees and gross annual income exceeding \$5 million - requires a manager with a bachelor's degree or its equivalent in restaurant and hotel management. The AAO does not agree. The foregoing quotation indicates that a baccalaureate or higher degree in restaurant or hotel management is not the standard requirement for entry into the occupation. As explained more fully in the *Handbook's* description of the training and education required of food services managers:

Most food service management companies and national or regional restaurant chains recruit management trainees from two- and four-year college hospitality management programs. Restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions - particularly self-service and fast-food - are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager or management trainee jobs . . . . [G]eneral managers need prior restaurant experience, usually as assistant managers.

A bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation. A number of colleges and universities offer four-year programs in restaurant and hotel management or institutional food service management. For those not interested in pursuing a four-year degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification.

*Handbook*, 2004-05 edition, at 44. What the *Handbook* makes clear is that, even if many food service managers have baccalaureate degrees in restaurant or food service management, there is ample opportunity to enter the occupation with credentials short of a four-year baccalaureate degree in the specific specialty. Accordingly, the restaurant manager position at issue in this petition does not meet the first alternative criterion of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

As for the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), counsel cites job advertisements from two other food service operators as evidence that they require their managers to have bachelor's degrees or the equivalent. One advertisement is from Aramark, a Philadelphia-based managed services company with 200,000 employees serving clients in 18 countries, for a food and beverage manager to help establish unit financial and operating goals, oversee all food service outlets within the unit, and develop the food and beverage management team. The announcement states that an ideal candidate would have a bachelor's degree and 5-8 years of experience in hospitality management. The second job advertisement is from the Los Angeles Athletic Club, which has four restaurants and is seeking a restaurant manager to oversee its dining facilities. The announcement stated

that the ideal candidate would have a bachelor's degree and at least three years of management experience in a restaurant, club, or hotel setting. Neither advertisement specifies that applicants must have a bachelor's degree in the specific specialty of restaurant and hotel management or a related specialty. Moreover, the first advertised position bears little relation to the proffered position in this case, since Aramark is a far larger enterprise than the petitioner, in a different line of business, and the duties performed by its food services manager are much broader in scope than those performed by the petitioner's restaurant manager. Based on the foregoing analysis the AAO concludes that the record fails to establish that a bachelor's degree in a specific specialty is common to the restaurant industry in parallel positions among similar organizations, as required for the proffered position to qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Nor does the record establish that the restaurant manager position is so complex or unique that it can only be performed by an individual with a specialty degree, as required for the proffered position to qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proffered position does not meet the third alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), because there is no evidence in the record that the petitioner has previously employed a restaurant manager at [REDACTED] and, if so, whether a bachelor's degree in a specific job-related specialty or its equivalent was required. Thus, the record does not show that the petitioner normally requires a bachelor's degree or its equivalent in a specific specialty for the proffered position.

Finally, the record does not establish that the specific duties of the restaurant manager position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. The duties of the position do not exceed the scope of those performed by a typical restaurant manager. Thus, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the petitioner has failed to demonstrate that its restaurant manager position meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The record does not establish that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

As previously discussed, the director also determined that the beneficiary was not qualified to perform the services of a specialty occupation. Since the beneficiary's credentials are relevant only if the proffered position is found to be a specialty occupation, which is not the case here, the AAO need not further address counsel's arguments with respect to the beneficiary's qualifications.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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