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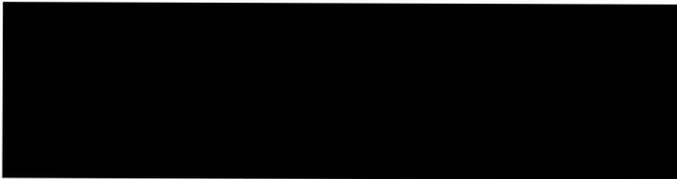
FILE: WAC 04 239 52912 Office: CALIFORNIA SERVICE CENTER Date: **AUG 02 2006**

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.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The 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 restaurant chain that seeks to employ the beneficiary as an operations-general manager. The petitioner, therefore, endeavors to extend the beneficiary's nonimmigrant classification as a 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 record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The director denied the petition on the basis of his determinations that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation and that the beneficiary is qualified to serve in a specialty occupation.

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.

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 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 proposed position.

In its August 18, 2004 letter of support, the petitioner stated that the duties of its proposed position would include: assessing and analyzing the management of food and beverage product objectives; identifying problems and making recommendations for causes of actions; developing and implementing systems for food and beverage management and delivery systems and improving efficiency of those systems; evaluating and controlling food and labor costs; maintaining overall responsibility for developing and implementing marketing programs and strategies for ensuring increased sales, profitability, and market share for the assigned location; studying statistical data, customer preferences, and marketing strategies in the field of restaurant management to provide efficiency of operation; monitoring the financial status of the restaurant; planning and taking corrective action; reviewing the store’s budget and proposing adjustments based on business trends as needed; conducting operational effectiveness reviews to ensure that functional or project systems are applied and functioning as designed; analyzing financial reports including profit and loss statements, general ledger, etc., as well as marketing reports on spreadsheets; charting and documenting findings of studies and preparing recommendations for the implementation of systems and procedures to corporate headquarters. While the beneficiary is currently working at the petitioner’s restaurant at the [REDACTED] Mall in South Pasadena, California, the petitioner proposes relocating him to a location in Henderson, Nevada.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

In his denial, the director likened the duties of the proposed position to those of food service managers and general managers or executives. On appeal, counsel contends that the duties of the proposed position are more specialized and complex than those of food service managers and general managers or executives.

In its discussion of the duties of food service managers, the 2006-2007 edition of the *Handbook* states the following:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they 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.

Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies. They plan for routine services or deliveries, such as linen services or the heavy cleaning of dining rooms or kitchen equipment, to occur during slow times or when the dining room is closed. Managers also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control. Managers or executive chefs receive deliveries and check the contents against order records. They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met. They meet with representatives from restaurant supply companies and place orders to replenish stocks of tableware, linens, paper products, cleaning supplies, cooking utensils, and furniture and fixtures.

Managers must be good communicators. They need to speak well, often in several languages, with a diverse clientele and staff. They must motivate employees to work as a team, to ensure that food and service meet appropriate standards. Managers also must ensure that written supply orders are clear and unambiguous.

Managers interview, hire, train, and, when necessary, fire employees. Retaining good employees is a major challenge facing food service managers. . . .

In addition to their regular duties, food service managers perform a variety of administrative assignments, such as keeping employee work records, preparing the payroll, and completing paperwork to comply with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws. Some of this work may be delegated to an assistant manager or bookkeeper, or it may be contracted out, but most general managers retain responsibility for the accuracy of business records. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid.

Technology influences the jobs of food service managers in many ways, enhancing efficiency and productivity. . . .

Food service managers use the Internet to track industry news, find recipes, conduct market research, purchase supplies or equipment, recruit employees, and train staff.

The *Handbook* states the following with regard to the duties and responsibilities of general and operations managers (this passage is contained within the *Handbook's* discussion of the "top executives" occupational grouping):

All organizations have specific goals and objectives that they strive to meet. Top executives devise strategies and formulate policies to ensure that these objectives are met. Although they have a wide range of titles—such as chief executive officer, chief operating officer, board chair, president, vice president, school superintendent, county administrator, or tax commissioner—all formulate policies and direct the operations of businesses and corporations, public sector organizations, nonprofit institutions, and other organizations. . . .

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. Their duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services. In some organizations, the duties of general and operations managers may overlap the duties of chief executive officers.

The AAO agrees with the director that the duties of the petitioner's proposed position are encompassed within the *Handbook's* discussion of these two occupational groupings. As such, the AAO next turns to the *Handbook's* discussion of the educational qualifications required for entry into these fields.

In its discussion of the educational requirements for food service managers, the *Handbook* offers the following information:

Experience in the food services industry, whether as a full-time waiter or waitress or as a part-time or seasonal counter attendant, is essential training for a food services manager. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs which require internships and real-life experience to graduate. Some 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. Executive chefs need extensive experience working as chefs, and general 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 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs offer graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-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. Both 2- and 4-year programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. Some programs combine classroom and laboratory study with

internships providing on-the-job experience. In addition, many educational institutions offer culinary programs in food preparation. Such training can lead to a career as a cook or chef and provide a foundation for advancement to an executive chef position. . . .

Thus, the *Handbook* explains unequivocally that a bachelor's degree is not the normal minimum requirement for entry into the proposed position, and its findings do not support the assertion that a bachelor's degree is required for entry. The statement that a bachelor's degree provides "particularly strong preparation" for a position or that employers "prefer" to hire candidates with such a degree is not synonymous with the "normally required" standard imposed by the regulation.

The *Handbook* reports the following educational requirements for those seeking employment as a general or operations manager:

The formal education 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. . . .

Many top executive positions are filled from within the organization by promoting experienced, lower-level managers when an opening occurs. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers. However, many companies prefer that their top executives have specialized backgrounds and, therefore, hire individuals who have been managers in other organizations.

As the *Handbook* finds that general or operations manager positions generally impose no specific degree requirement on individuals seeking employment, the petitioner cannot establish that its proposed position, which is closely aligned to that of a general or operations manager, is one that normally requires the beneficiary to hold a baccalaureate or higher degree, or its equivalent, in a specific specialty.

The statement that many top executives have college degrees is not synonymous with the "normally required" standard imposed by this criterion. While the *Handbook* indicates that top management positions may be filled by individuals with a broad range of degrees, its subsequent discussion of the training and education necessary for such employment clearly states that companies also hire executives based on lower-level experience within their own organizations or management experience with another business.

However, even if the *Handbook* had indicated that degrees in business administration and the liberal arts were normally required for employment as a general or operations manager, the petitioner could not use them to establish its proposed position as a specialty occupation under the first criterion. When a range of degrees, e.g., the liberal arts, or a degree of generalized title without further specification, e.g., business administration, suffices for a job, the position does not qualify as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study. As noted previously, CIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A) to require a degree in a specific specialty that is directly related to the proposed position.

Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has reviewed the job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in positions that are parallel to the proffered position and found in organizations similar to the petitioner.

Aramark, the University of Texas M.D. Anderson Cancer Center, Marriott International, and the Crow Canyon Country Club do not operate within a business model similar to that of the petitioner. The only job postings that may be considered to be from similar organizations are those from Wendy's and Dairy Queen. However, advertisements from two companies are too few to establish an industry standard.

Moreover, the position described in the job posting from Dairy Queen is not a "parallel position" to the one proposed by the petitioner. The position at Dairy Queen involves developing strategies to create new product lines, championing new product launches, and leading test marketing programs. Such duties are not present in the petitioner's proposed position.

Nor do all the job postings establish that a four-year degree is required for the position. For example, the Crow Canyon Country Club will accept five years of club management in lieu of a degree, and the University of Texas M.D. Anderson Cancer Center will also substitute experience for a degree.

As such, the petitioner has not demonstrated that its degree requirement exists in parallel positions among similar organizations.

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is very similar to the food service manager and general or operations manager positions described in the *Handbook*.

Accordingly, the petitioner has not established its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

Counsel and the petitioner contend that the proposed position qualifies as a specialty occupation under this criterion. On appeal, counsel contends that the petitioner has required that candidates for this position have been required to possess at least a bachelor's degree since 2002.

However, this statement conflicts with a statement from the petitioner: the petitioner stated in its January 25, 2005 response to the director's request for additional evidence that 70% percent of its managers hired since 2002 have held a bachelor's degree.

That 30%, or nearly one-third, of such individuals hired since 2002 do not possess a bachelor's degree is not indicative of a normal requirement for a degree or its equivalent for the position. Rather, it is indicative of a preference for a degree. As noted previously in this discussion, employer preferences are not synonymous with educational requirements that are necessitated by the type and level of knowledge actually required to perform a position.

Moreover, the AAO notes that counsel has submitted no evidence to document its assertion that the employer normally requires a degree for the position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, the proposed position does not qualify as a specialty occupation under the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty occupation.

To the extent they are described in the record, the duties of the proposed position do not support a conclusion that they would require the beneficiary to possess at least a bachelor's degree level of knowledge in a specific specialty. There has been no demonstration that the duties of the proposed position are more specialized or complex than the food service manager and general operation manager positions described in the *Handbook*, which, as noted previously, do not require a baccalaureate degree or its equivalent in a specific specialty. Therefore, the proposed position does not qualify as a specialty occupation under the fourth criterion.

Lastly, the AAO turns to counsel's submission on appeal of an advisory opinion from [REDACTED] an associate professor at the University of Nevada at Las Vegas. Professor [REDACTED] concludes that the duties of the proposed position are similar to those of an operations research analyst, and that they require an individual with at least a bachelor's degree to perform them.

However, an inadequate factual foundation to support Professor [REDACTED] opinions has been established. He does not note the location or size of the petitioner, nor does he indicate whether he reviewed company information about the petitioner, visited its site, reviewed any work products that are produced by individuals working in positions similar to the position proposed here, or interviewed anyone affiliated with the petitioner. The extent of the professor's knowledge of the proposed position is, therefore, questionable. Furthermore, the professor's submission is skeletal and conclusory. It states opinions, lists generalized duties, and broadly references attachments, but it does not explain the analysis, if any, that the professor applied to the duties that he listed. Thus, the professor has not established the reliability and accuracy of his pronouncements. His submission therefore is not probative of any of the specialty occupation criteria. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way

questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Moreover, even if the AAO were to accept this evaluation, the petition could not be approved. According to information contained in the *Handbook*, while the occupation of an operations research analyst is normally a specialty occupation, normally requiring those seeking entry-level employment to possess a master's degree in operations or a closely related field, such as computer science, engineering, business, mathematics, information systems, or management science, coupled with a bachelor's degree in computer science or a quantitative discipline such as economics, mathematics, or statistics, the beneficiary does not possess a master's degree. He would therefore be unqualified to fill such a position.

The proposed position does not qualify for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and the petition was properly denied. As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will 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.