

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY



D2

FILE: SRC 05 156 51273 Office: TEXAS SERVICE CENTER Date:

JAN 25 2000

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:

SELF-REPRESENTED

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition and certified her decision to the Administrative Appeals Office (AAO). The director's decision will be affirmed. The petition will be denied.

The petitioner is a restaurant/store and seeks to employ the beneficiary as an importing and trading food 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 instant petition was approved on July 15, 2005. On March 8, 2006, the director issued a notice of intent to revoke (NOIR) stating that "upon interview, it was determined that the position offered does not qualify as a specialty occupation requiring the minimum of a bachelor's degree or its equivalent. It was also discovered that there are discrepancies in the information provided on the I-129 petition." The petitioner was given 30 days in which to respond to the notice. On April 24, 2006, the director revoked the approval of the petition stating that the petitioner failed to respond to her NOIR. On May 11, 2006, the petitioner filed a Form I-290B submitting evidence of a timely response to the NOIR. On August 6, 2007, the AAO remanded the instant case to the director, having determined that the petitioner's response to the director's NOIR was received by the service center on April 4, 2006, within the 30 days specified on the notice. The matter was, therefore, remanded to the director for her consideration of the petitioner's response to the NOIR in accordance with 8 C.F.R. § 214.2(h)(11)(iii)(B). On October 27, 2007, upon reconsideration, the director found that additional evidence presented by the petitioner did not overcome the NOIR and certified her decision to the AAO for review. On November 15, 2007, the AAO notified the petitioner of its right to submit to the AAO a brief or other written statement addressing the director's new decision within 33 days. To date, the AAO has not received a response from the petitioner. Therefore, the record of proceeding is complete.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's notice of intent to revoke (NOIR) dated March 8, 2006; (3) the director's decision dated April 24, 2006; (4) the Form I-290B and supporting documentation; (5) the AAO's decision withdrawing the revocation and remanding the decision to the director for further consideration; (6) the director's decision dated October 27, 2007; (7) the AAO's letter to the petitioner dated November 15, 2007. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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:

An 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 above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The petitioner states that it is seeking the beneficiary's services as an importing and trading food manager. The only evidence of the beneficiary's duties is described in the petitioner's letter of support which states the following:

As importing and trading – food manager, [the beneficiary] will order food commodities from the Philippines such as canned goods, ingredients, and native delicacies. This will be used to prepare food, season, garnish and cook a wide range of Philippine and oriental food, from soups, snacks and salads to entrees, side dishes, and desserts. [The beneficiary] will be responsible for resale to consumers at wholesale or retail level. She will then analyze past buying trends, sales records, price and quality of merchandise to determine reasonable

costing and yield. She will select, order and authorize payment for merchandise according to contractual agreements. She will be responsible for introducing new products and order food supplies and oversee sales operations to ensure uniform quality and preparation of goods.

To make its determination as to whether the employment described in the record qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2) which require that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, or that 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

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 first turns to the *Handbook* for its discussion of food service managers as it is most similar to the importing and trading food manager position as described by the petitioner. As stated by the *Handbook*, 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.

The *Handbook's* information about the qualifications of food service managers is as follows:

Experience as a waiter or waitress, cook, or counter help is the most common way to enter the occupation. Executive chefs, in particular, need extensive experience working as chefs. 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 experience, interest, and aptitude.

Postsecondary education is preferred for many food service manager positions, but it is not a significant qualification for many others: More than 40 percent of food service managers have a high school diploma or less; less than one-quarter have a bachelor's or graduate degree. However, a postsecondary degree is preferred by higher end full-service restaurants and for many corporate positions, such as managing a regional or national restaurant chain or franchise or overseeing contract food service operations at sports and entertainment complexes, school campuses, and institutional facilities. A college degree also is beneficial for those who want to own or manage their own restaurant....

The *Handbook* reports that for the position of food service manager, "postsecondary education is preferred for many food service manager positions, but it is not a significant qualification for many others." It does not however, indicate that a baccalaureate degree is the minimum educational requirement for food service managers. The *Handbook's* discussion of the occupation of food service managers clearly indicates that food service manager positions may be filled by individuals possessing "a high school diploma or less." Accordingly, the listed duties do not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Based on the evidence in the record, the AAO finds that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish its degree requirement as the norm within its industry under the first prong of the second criterion, the petitioner has not submitted any evidence in support of its position that a bachelor's degree is the industry standard. Therefore, the proffered position may not be established as a specialty occupation based on an industry-wide degree requirement. The petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner. Consequently, the petitioner fails to establish the second alternative prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories,

including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner has not shown that it has previously hired personnel with a bachelor's degree requirement for the position of importing and trading food manager. Although the petitioner states in its letter of support that "for this position, I minimally require [an] importing and trading food manager who knows Philippine and oriental foods, a college degree program in management or a closely related field or the equivalent." While it is not necessary that the petitioner currently employ or have hired another person in the proffered position, the petitioner has not submitted any evidence that it normally requires a degree or its equivalent for the position of importing and trading food manager and therefore, eligibility under this criterion has not been established.

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, the critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. *See Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these 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 proposed position 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. The evidence of record fails to establish that the proffered position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Finally, in his decision dated October 27, 2007, the director addressed the petitioner's explanation regarding the discrepancies in the information provided on the Form I-129. Although the petitioner provided an explanation for the discrepancy in its stated gross and net annual income, it did not explain the discrepancy in the number of employees stated on the Form I-129. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

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.

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 director's October 27, 2007 decision is affirmed. The petition is denied.