PUBLIC COPY

U.S. Department of Homeland Security

Citizenship and Immigration Services

D2

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS. 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: EAC 02 247 52656 Office: VERMONT SERVICE CENTER Date: JAN 06 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:

This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was initially approved by the Vermont Service Center on September 6, 2002. A Notice of Intent to Revoke (NOIR) was thereafter served on the petitioner. The director then revoked approval of the I-129 petition on December 23, 2002. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner operates two McDonald's restaurant franchises. It has 95 employees, a gross annual income of $2,462,954, and seeks to employ the beneficiary as a food service manager. The director determined that the proffered position failed to qualify as a specialty occupation.

On appeal, counsel submits a brief and additional information. Counsel asserts that the proffered position qualifies as a specialty occupation and satisfies all criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A).

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), 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.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as 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 field 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.

The AAO does not simply rely on a position's title when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position, combined with the nature of the petitioning entity's business operations, are factors that the AAO considers. The beneficiary's job responsibilities were detailed with the filing of the I-129 petition:

> Our company is exploring expansion through the acquisition of additional franchises. We are in need of the services of a Food Service Manager to coordinate the food service activities at each of our Boston, MA restaurants. This manager will report directly to [the Owner/CEO] . . . [The beneficiary] will be responsible for supervising other shift managers, production managers, service managers and staff and have the following duties:
>
> - Responsible for all operations and functions of the franchise;
> - Estimate food and beverage costs, requisition and purchase product and supplies;
> - Direct hiring, firing and assignment of personnel;
> - Responsible for all training of personnel to

maintain consistent level of quality and service;

- Investigate and resolve food quality and service complaints; and

- Review financial transactions and monitor budget to ensure efficient operation, and to ensure expenditures stay within budgetary limitations.

Subsequent to the filing of the I-129 petition, the director requested additional evidence. Specifically, the director requested proof that: a baccalaureate degree in a specific field of study is a standard minimum requirement for the offered position in the petitioner's company or industry; and the petitioner normally employed individuals with a baccalaureate degree in a specific field of study for the offered position.

In response to that request, the petitioner provided two advisory opinions. The first opinion was from [redacted] Dean of the School of Hospitality Management at Widener University of Chester, PA, and is dated August 20, 2002. Dean Hadgis opined that the proffered position requires a baccalaureate degree (field of study unspecified) along with industry training and experience for entry into the position. The second opinion is dated August 19, 2002, and was prepared by [redacted] Professor and Chair, of the Department of Food and Beverage Management, William F. Harrah College of Hotel Administration, Las Vega, Nevada. It was Professor [redacted] opinion that it was the preference of McDonald's, and other restaurant companies, to hire entry-level managers who possess four year college degrees in hospitality and/or business.

In further response to the director's request for evidence, the petitioner noted that it had recruited for the offered position through newspaper classified ads in the Boston Globe and through Internet postings on its web site. The petitioner states that the Internet ad ran continuously for over 6 months, with no response. The petitioner also indicates in its August 27, 2002, response, that during the past two years the position had been filled by the CEO and his wife. The CEO holds a bachelor's degree in an unspecified discipline, and his wife holds an Associate's Degree in an unspecified discipline. Both have over ten years experience in the restaurant/hospitality industry.

As previously noted, the I-129 petition was approved on September 6, 2002. On September 20, 2002, the director issued a NOIR, noting that the subject position did not appear to qualify as a specialty occupation. Specifically, the director noted that the position had previously been performed by one individual with a bachelor's degree, and another with only an Associate's Degree.

Pursuant to applicable regulation, the petitioner was given 30

days to present evidence that would overcome the stated reasons for revocation.

In response to the NOIR, the petitioner responded that the CEO's wife possessed an associate's degree, plus over 37 years of progressively responsible experience in the restaurant and hospitality industry, and that her degree and experience were equivalent to a Bachelor's Degree in Food Service Management. The petitioner also listed three previous holders of the offered position that were no longer employed with the company, and stated that each possessed a bachelor's degree.

In further response, the petitioner stated that the duties of the offered position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In support of that conclusion the petitioner submitted copies of reports that the beneficiary would be required to complete to establish franchise compliance with standards set by the McDonald's Corporation. The beneficiary would also be required to complete: periodic financial statements; a monthly profit and loss report; a product sales report; a daily store report; a sales ledger; an inventory reorder report; a supervisor audit worksheet deposit validation report; a product mix report; an inventory stat report; a QCR optimum food cost report; a raw waste report; a completed waste report; and a labor analysis report.

Supplemental opinion letters were also submitted from Dean [redacted] and Professor [redacted] Dean [redacted] again stated that the complexity of the position offered required a minimum of a bachelor's degree in hotel/restaurant management, or a related field, as a minimum requirement for entry into the position. Professor [redacted] stated that a bachelor's level education is necessary for the position offered. He further indicated, however, that while a four year degree is preferred, many company's are forced to "underhire" for competitive reasons, and then further educate and/or train employees.

In revoking the I-129 approval, the director stated that the petitioner had failed to establish that the proffered position: required a bachelor's degree; or that the duties of the position were especially complex or unique.

On appeal, counsel submits a brief and additional information. Counsel asserts that the proffered position qualifies as a specialty occupation and satisfies all criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A).

In the U.S. Department of Labor's *Occupational Outlook Handbook*, 2002-03 edition, (*Handbook*), at 55-56, the duties of a food service manager are detailed:

The daily responsibilities of many food service managers can often be as complicated as some of the meals prepared by a fine chef. In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently, and achieving quality in food preparation and service, managers now are responsible for a growing number of administrative and human resource tasks. For example, managers must carefully find and evaluate new ways of recruiting employees in a tight job market. Once hired, managers also must find creative ways to retain experienced workers.

In most restaurants and institutional food service facilities, the manager is assisted in these duties by one or more assistant managers, depending on the size and operating hours of the establishment. In most large establishments, as well as in many smaller ones, the management team consists of a general manager, one or more assistant managers, and an executive chef. . . . In fast-food restaurants and other food service facilities open for long hours - often 7 days a week - several assistant managers, each of whom supervises a shift of workers, aid the manager. . . .

. . . .

On a daily basis, managers estimate food consumption, place orders with suppliers, and schedule the delivery of fresh hood and beverages. They receive and check the content of deliveries, evaluating the quality of meats, poultry, fish, fruits, vegetables, and baked goods. To ensure good service, managers meet with sales representatives from restaurant suppliers to place orders replenishing stocks of tableware, linens, paper, cleaning supplies, cooking utensils, and furniture and fixtures. They also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control.

The quality of food dishes and services in restaurants depends largely on a manager's ability to interview, hire, and, when necessary, fire employees. This is especially true in tight labor markets, when many managers report difficulty in hiring experienced food and beverage preparation and service workers. . . . Once a new employee is hired, managers explain the establishment's policies and practices and oversee any necessary training. Managers also schedule the work hours of employees, making sure there are enough workers present to cover peak dining periods. If employees are unable to work, managers may have to fill in for them.

> Some managers regularly help with cooking, clearing of tables, or other tasks. . . . They also investigate and resolve customer's complaints about food quality or service. . . .
>
> In addition to their regular duties, food service managers have a variety of administrative responsibilities. Although much of this work is delegated to a bookkeeper in a larger establishment, managers in most smaller establishments, such as fast-food restaurants, must keep records of the hours and wages of employees, prepare the payroll, and fill out paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid on a regular basis. . . .
>
> . . . .
>
> At the conclusion of each day, or sometimes each shift, managers tally the cash and charge receipts received and balance them against the record of sales. In most cases, they are responsible for depositing the day's receipts at the bank or securing them in a safe place. . . .

The duties of the offered position fall within the duties set forth above. It is understood that this particular position is responsible for the overall operation of a high volume business establishment, and that the beneficiary supervises other assistant managers and employees. Those duties are not, however, inconsistent with those listed in the *Handbook* for Food Service Managers.

The petitioner has not met any of the regulatory requirements to qualify the offered position as a specialty occupation. The *Handbook* notes that a bachelor's degree in restaurant and food service management provides strong preparation for a career in this occupation. Candidates are recruited, however, from two and four year college hospitality management programs, as well as from technical institutes and other institutions offering programs leading to associate degrees or other formal certification. *Id.* at 56-57. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position. This finding is consistent with the opinion offered by Professor Stefanelli on October 10, 2002, wherein the professor acknowledged that many companies prefer baccalaureate level education, but that many hire individuals with lesser levels of education and then provide

additional education, training, and/or experience.

The petitioner also failed to establish any of the remaining three criteria:

First, it was not established that a degree requirement was common to the industry in parallel positions among similar organizations, or alternatively, that the position was so complex or unique that it can be performed only by an individual with a degree. Neither of the opinion letters presented offer convincing evidence that a degree requirement is standard in the industry. The letters offer the opinion of the learned writers, but no corroborating evidence is presented in support of those opinions. As noted above, those opinions are contradictory to the Department of Labor's findings noted in the *Handbook*. Furthermore, the duties offered to the beneficiary are common in the industry for food service managers, and are not unusually complex or unique.

Second, the petitioner has not established that it normally requires a degree in a specific specialty, or its equivalent for the position. The petitioner states that the position has been performed by the CEO and his wife in recent years, and that both have bachelor's degrees or the equivalent thereof. The record does not disclose the educational discipline of either degree holder. It is, therefore, impossible to determine whether either holds a degree in a related specialty. Furthermore, the record is not sufficient to determine that the CEO's wife possesses the equivalent of a bachelor's degree based upon her associate degree and work experience. The record does not reflect that her experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation, or that she has recognition of expertise in the specialty. 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). Evidence of past managers educational backgrounds was not established. A statement in an employee folder that an employee has a certain level of education in an unspecified discipline is not sufficient to establish that the employee had baccalaureate level education in a specific related specialty. Finally, the petitioner stated that it had placed advertisements on the Internet, and in the Boston Globe for the proffered position. Proof was offered in the form of newspaper billing statements to establish this. The petitioner did not, however, offer copies of those advertisements to prove that the petitioner required a minimum of a bachelor's degree or its equivalent for consideration.

Finally, the duties of the offered position are not so specialized and complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The listed duties are similar to those listed in the *Handbook*, and appear to be common in the industry among similar organizations. The fact that the petitioner's franchisor

has stringent reporting requirements, or that the petitioner's business is a high volume business, does not render the duties of the position so specialized or complex that a bachelor's level education is required to perform them. Indeed, the *Handbook* states the contrary. *Id.* at 56-57.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.