

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

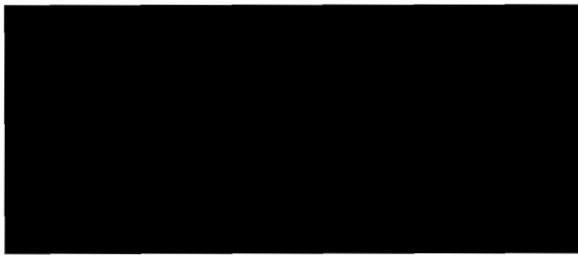
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

D,



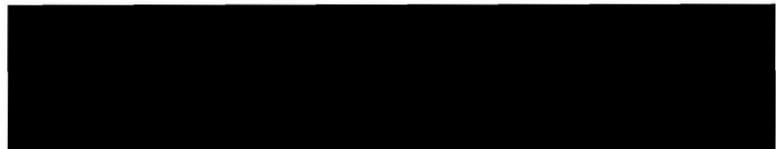
FILE: WAC 07 029 51051 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2008**

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, 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 operates nine fast food restaurants and claims to employ 200 personnel. It seeks to employ the beneficiary as a general store manager. Accordingly, 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 record of proceeding before the AAO contains: (1) the Form I-129 filed November 7, 2006 and supporting documentation; (2) the director's February 8, 2007, request for evidence (RFE); (3) the petitioner's April 26, 2007, response to the director's RFE; (4) the director's May 21, 2007 denial letter; and (5) the Form I-290B and counsel's brief in support of the appeal.¹ The AAO reviewed the record in its entirety before reaching its decision.

On May 21, 2007, the director denied the petition, determining that the proffered position is not a specialty occupation. On appeal, counsel submits a brief. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

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 Counsel checked the box on the Form I-290B indicating that she was filing an appeal. However, the supporting brief and statement on the Form I-290B indicate that this is a motion to reopen and reconsider the director's decision. Due to the conflicting information on the Form I-290B, the AAO will adjudicate the matter as an appeal.

- (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.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). **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.**

The petitioner states that it is seeking the beneficiary's services as a general store manager. On the Form I-290B, the petitioner indicated that the beneficiary would be "[r]esponsible for supervising, hiring, & training employees." In response to the director's RFE, the petitioner listed the beneficiary's responsibilities as:

- Achieve the Company's Goal of maintaining high standards in Quality and Service
- Staffing and training the restaurant with qualified team members
- Product Ordering
- Scheduling
- Evaluating and analyzing the performance of the restaurant
- Problem-solving
- Maintaining sound operating and cost controls
- Ensure food-safety
- Growth in revenue and profit

The petitioner also explained that it had acquired nine Arby's restaurants in March 2006 and that at the time of acquisition, the beneficiary was operating one of the restaurants pursuant to an H-1B classification valid from January 2, 2004 to January 2, 2007.

On May 21, 2007, the director denied the petition. The director observed that the proffered position most closely resembled the Department of Labor's *Occupational Outlook Handbook's (Handbook)* report on food service managers. The director found: that the *Handbook* did not report that a baccalaureate level of training is a normal industry-wide minimum for entry into the position; that the record did not substantiate that the petitioner normally required applicants for the position to possess baccalaureate or higher level degrees in the field; or that the proposed duties of the position are complex or require greater authority than normally encountered in this occupational field. The director concluded that the petitioner had not established that the proffered position met any of the criteria for classification as a specialty occupation.

On appeal, counsel for the petitioner asserts that the beneficiary's foreign degree in psychology demonstrates that the beneficiary has met the minimum entry requirement. Counsel references the beneficiary's previous H-1B approval for this same position and asserts that this factor satisfies the requirement of a bachelor's degree in a similar organization. Counsel contends that the proffered position is complex as the beneficiary has to deal with 200 employees. Counsel also notes that the position is not just any managerial position but a general manager position that requires: "an ability to handle other projects; experience; personal qualities; attainment of both college degree; cope with rigorous company training programs; self-discipline; initiative; leadership ability; ability to solve problems; ability to concentrate on details; good communication skills, when dealing with customers and suppliers; good public and staff relationships; ability to motivate and direct staff; clean, professional appearance, and professional competency; and willingness to relocate and accept greater responsibility." Counsel also cites several cases for the proposition that there are circumstances that would prevent an alien professional from gaining employment in his or her chosen profession and thus applicants need not be employed in the contemplated profession at the time of filing, approval, or even granting of permanent residence. Counsel references the *Handbook's* report on food service managers and notes that food service and 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.

Counsel's assertions are not persuasive. Preliminarily, the AAO emphasizes that the beneficiary's foreign degree is not relevant when establishing a position as a specialty occupation. Instead it is the nature of the proposed duties of the position as those duties relate to the petitioner's business that establishes a position as a specialty occupation. The AAO acknowledges that the beneficiary's foreign degree in psychology may qualify the beneficiary to perform the duties of a food service manager or a general manager of a fast food restaurant; however, such a position is not a specialty occupation. In addition, the AAO acknowledges that a previously filed petition on the beneficiary's behalf was approved. However, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Moreover, if that record contained the same evidence as submitted with this petition, the CIS would have erred in approving the previously filed petition. CIS is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO now turns to a review of the duties of the proffered position to determine whether the petitioner has provided evidence that the proffered position is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* states the following with regard to the employment of food service managers, the position that mostly closely resembles the duties of the proffered position:

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.

The *Handbook* continues:

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality or service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service.

Regarding the educational requirements of food service managers, the *Handbook* states:

Experience in the food services industry, whether as a full-time waiter or waitress or as a part-time 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 experience, interest and aptitude. Many restaurant and food service manager positions – particularly self-service and fast-food – are filled by promoting experienced food and beverage preparation and service workers.

Although the *Handbook* reports that a bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation, the *Handbook* also recognizes that community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree or other formal certification. The *Handbook* notes that both two and four-year programs provide similar instructional courses and emphasizes that most employers have rigorous in-house training programs for management employees. Thus, the *Handbook* recognizes several avenues leading to employment as a food service manager. Based on this information, the AAO finds that the occupation of a

food service manager does not require a bachelor's or higher degree in a specific specialty. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Likewise, the petitioner has not offered substantive evidence to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations as required by the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). Factors considered by the AAO when determining this criterion include: whether the *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)). The petitioner has not provided any evidence that other companies in the industry routinely employ only degreed individuals for the position of general manager of a fast food restaurant. The AAO acknowledges the beneficiary's prior approval in H-1B status for the predecessor of the petitioner's business, but again the AAO observes that approval of a general manager of a fast food restaurant, if the position incorporated the same or similar duties as described by the instant petitioner, constituted material error. The record does not contain evidence that the fast food industry commonly requires a specific baccalaureate or higher degree for positions parallel to the proffered position.

The petitioner has also failed to establish the second prong of the second criterion. The record does not contain evidence that would show the proffered position is so complex or unique that only an individual with a degree can perform the position. The description of the duties of the proffered position is that of a food service manager, an occupation that does not require a bachelor's degree in a specific specialty. The AAO is not persuaded that the nature of the specific duties of the proposed position is more unique and complex than that of a typical general manager of a fast food restaurant or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in a specific discipline. The record does not contain evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), that the petitioner normally requires a degree or its equivalent for the position. Although the petitioner's predecessor previously employed the beneficiary as the general manager of a fast food restaurant, as referenced above, the erroneous approval of a previous petition does not establish that the proffered position is a specialty occupation. In addition, 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. 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. 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 duties of the proffered position do not exceed the scope of those performed by a food service manager, an occupation that does not require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4); namely, that the petitioner establish that the

nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the occupation of a food service manager is an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. The petitioner has provided a general description of the duties associated with the proffered position but has not explained how or offered documentary evidence to substantiate that the nature of the duties is specialized and complex, beyond the routine duties of a food services manager. The AAO acknowledges counsel's claim that the proffered position is complex because the beneficiary must deal with 200 employees; however, the petitioner indicates that the proffered position is for a single store general manager. Neither counsel nor the petitioner has explained or documented that the individual in the proffered position will be responsible for handling more than the employees at a single fast food location. Nor has the petitioner documented the number of employees that would be under the supervision of the individual in the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The general description of the nature of the duties of the proffered position does not detail any elements of the proffered position that are more complex or specialized than that of a typical food service manager. The petitioner has not established that the proffered position is a specialty occupation based on the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petition will be denied and the appeal dismissed for the above stated reason. As always, 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.