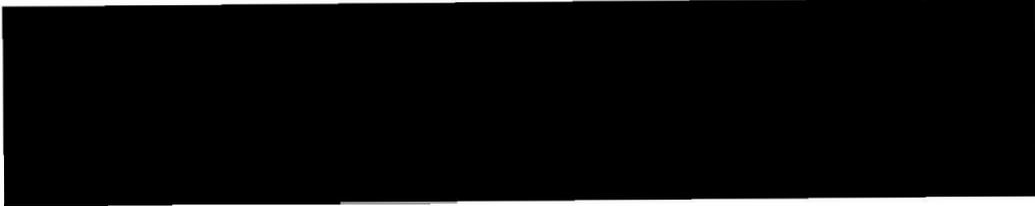




U.S. Citizenship
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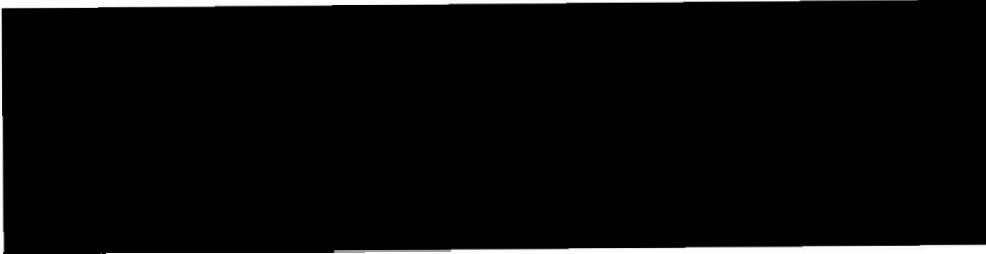
FILE: LIN 04 249 50335 Office: NEBRASKA SERVICE CENTER Date: **MAR 28 2006**

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, Director
Administrative Appeals Office

DISCUSSION: The director of the 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 is a restaurant management and development company that seeks to employ the beneficiary as a regional and development 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 director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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.

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 proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a regional and development manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail leading the company and developing business opportunities at seven facilities; establishing and implementing sales and organizational policies and goals; evaluating policies regarding personnel, operations/logistics, and finance; reviewing activity and financial statements to determine the progress in attaining objectives and plans in accordance with current conditions; monitoring market trends and determining the need for additional products and services; formulating, directing and coordinating marketing programs to provide new or continued sales opportunities, including analyzing new actions that increase value to the brand and business performance; directing and evaluating the performance of store managers and recommending hiring, promoting, disciplining, or terminating employees; seeking new markets and business opportunities; establishing a research methodology for gathering relevant data such as surveys, opinion polls, or questionnaires; developing franchise activities from lease negotiations through build-out, staffing, and opening, which includes evaluating advertising and promotion programs; investigating and pursuing potential market opportunities, including business firms, wholesales, retailers, and the general public. For the proposed position, the petitioner requires a bachelor's degree (the equivalent) in business administration or business management.

In the denial letter, the director stated that the petitioner failed to submit a list of previous regional and development managers, although it had an opportunity to do so. The director determined that the proposed position is a general managerial job, and that according to *Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791 (1988) general managerial positions do not qualify as a professional endeavor requiring a specific academic degree. The director found the analogy of the proposed position to a market and survey researcher unpersuasive, concluding that most managerial positions have incidental market research responsibilities. Such responsibilities, the director stated, do not change the occupation into that of a market and survey researcher. The director discussed the beneficiary's qualifications for a specialty occupation.

On appeal, counsel states that the submitted evidence shows that the beneficiary is qualified for a specialty occupation. Counsel asserts that the evidence demonstrated that the beneficiary's duties are a combination of those of a market research analyst, a financial analyst, and a marketing manager, as those occupations are described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*). Counsel states that the beneficiary's duties have the following time allotments: new business development (35 percent); formulating and evaluating sales policy (15 percent); and development operations (10 percent). Marketing duties of 60 percent, counsel asserts, are not incidental. About 20 percent of the proposed duties relate to a financial analyst, counsel states. Counsel states that the beneficiary's position is specific and narrowly defined; thus, it is distinguishable from the position in *Matter of Caron Int'l, Inc.* Counsel states that prior AAO decisions concluded that a position could be a specialty occupation based upon a combination of duties. To establish that a bachelor's degree is common in parallel postings among organizations that are

similar to the petitioner, counsel references previously submitted job postings. Counsel states that the beneficiary will manage seven facilities and will include several others in the future.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

Counsel asserts that the AAO has already determined that the proffered position is a specialty occupation since the AAO has approved other, similar petitions in the past. This record of proceeding does not, however, contain the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceedings, counsel's assertions are not sufficient to enable the AAO to determine whether those petitions are similar to this petition. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In 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). In addition, CIS is not required to approve 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). Neither CIS nor any other 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 first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; 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 often considered by CIS when determining these criteria include: whether the *Handbook* reports that 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 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. Although the director implied that the petitioner modified the duties in the job description that was submitted in response to the request for evidence, the AAO finds that the job description in the August 27, 2004 letter is consistent with, and simply elaborates on, the job description submitted in response to the request for evidence.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The *Handbook* reveals that the proposed duties, which involves responsibility for seven franchise sandwich shops, is a combination of those of a general and operations manager and a marketing manager. For a general and operations manager position, the *Handbook* conveys:

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.

A general and operations manager plans, directs, or coordinates operations; plans the use of materials and human resources; formulates policies; and manages daily operations. The beneficiary's duties comprise these areas. The beneficiary will formulate policies by: establishing and implementing sales and organizational policies and goals; evaluating policies concerning personnel, operations/logistics, and finance; and reviewing activity and financial statements in order to determine and revise objectives and plans. The beneficiary will direct and plan the use of human resources, and he will direct and evaluate the performance of store managers.

On appeal, counsel distinguishes the vice-president in *Matter of Caron Int'l Inc.* by stating that the proposed position is specific and narrowly defined. The AAO agrees that the proposed position differs from the position described in *Matter of Caron Int'l, Inc.* However, the difference between the two positions has no bearing on whether the position offered here, regional and development manager, is similar or dissimilar from an operations and general manager as that occupation is portrayed in the *Handbook*.

The *Handbook* describes a marketing manager as follows:

Marketing managers develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services, and they oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

Similar to a marketing manager that develops marketing strategy, estimates the demand for products and services, identifies potential markets, and monitors trends that indicate the need for new products and services, the beneficiary will “monitor market trends and determine the need for additional products and services”; formulate the “marketing programs”; seek “new markets and business opportunities”; research and analyze “prospective locations and market opportunities”; and “investigate and pursue potential market opportunities, including business firms, wholesalers, retailers, and the general public.” The petitioner states that the beneficiary will establish “a research methodology for gathering relevant data and investigating and pursuing clients such as business firms, wholesales, retailers, and the general public.” However, the petitioner

does not specifically identify the time that the beneficiary will spend performing this duty, which may relate to a market research analyst. Nor does the record include any evidence to establish the substantive nature of the “research methodology” and to identify the applications of theoretical and practical knowledge that would be employed.

The *Handbook* reports that a top executive, such as a general and operations manager, and managerial positions in marketing do not require a bachelor’s degree in a specific academic field. For top executives, the *Handbook* states:

The formal education and experience 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.

The *Handbook* continues:

Because many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many top managers have been promoted from within the organization. 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.

The *Handbook* explains that general and operations managers are not required to hold a bachelor’s degree in a specific specialty, and employers accept degrees in business administration or the liberal arts or promote lower level managers who may not hold degrees. *Matter of Michael Hertz Assocs., 19 I&N Dec. 558, 560 (Comm. 1988)*, indicates “the requirement of a degree of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility.” Thus, the proposed duties that are similar to those of an operations and general manager would not require a bachelor’s degree in a specific specialty.

For a managerial position in marketing, the *Handbook* conveys that employers do not require a bachelor’s degree in a specific academic discipline. The *Handbook* states:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. A bachelor’s degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

For marketing, sales, and promotions management positions, some employers prefer a bachelor’s or master’s degree in business administration with an emphasis on marketing.

Based on the evidence in the record and the *Handbook's* information, 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 in a specific specialty is the normal minimum requirement for entry into the particular position.

The petitioner submits job postings to establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations. Of the 19 postings, only 3, Wendy's, Baja Fresh Mexican Grill, and Panda Express, are in the same industry as the petitioner. Nonetheless, the duties in the Wendy's posting differ from those of the proposed position in that they all relate to market research analysis. Panda Express, a company with \$600 million in sales, and Baja Fresh Mexican Grill, a company with 315 restaurants in 26 states, differ in nature from the petitioner, a company managing 7 sandwich shops. Baja Fresh Mexican Grill, the AAO notes, seeks a marketing analyst for the home office that oversees the 315 restaurants. The job postings, therefore, are insufficient in establishing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proffered position is so complex or unique that it can be performed only by an individual with a degree. As discussed earlier in this decision, the proposed duties are a combination of those of a general and operations manager and a marketing manager, which are occupations that do not require a bachelor's degree in a specific academic specialty. Thus, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence in the record establishes the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3): that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish that the nature of the specific 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 this decision the AAO has already conveyed that the proposed duties resemble those of a general and operations manager and a marketing manager, which are occupations that do not require a bachelor's degree in a specific specialty. Furthermore, the petitioner describes the proposed duties in exclusively generic terms (such as "leading the company," "monitoring market trends," and "formulating, directing, and coordinating marketing programs") that lack sufficient specificity to demonstrate the level of knowledge required to perform them. Accordingly, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 of the petition on this ground.

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.

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Page 8

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