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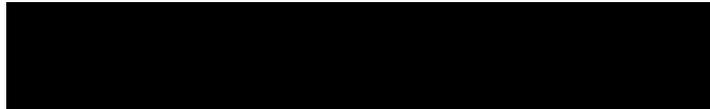
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FILE: SRC 03 162 50102 Office: TEXAS SERVICE CENTER

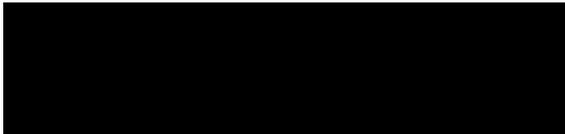
Date: FEB 07 2005

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 materials have been returned
to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner is a Japanese restaurant. It seeks to employ the beneficiary as a restaurant manager and to classify her 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 on the grounds that (1) the proffered position did not qualify as a specialty occupation and (2) the applicant did not qualify to perform the services of the subject specialty occupation. On appeal counsel argues that the director erred in both of her determinations.

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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) Form I-290B, counsel's appeal brief, and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

As stated in the Form 1-129, the petitioner seeks to hire the beneficiary to manage its sushi restaurant. In a letter accompanying the petition the duties of the job were described as follows:

Our Restaurant Manager will oversee all areas of the restaurant management, including accounting, purchasing, preparing our budget, marketing, daily operations, and all personnel matters. She will oversee the estimating of food and beverage costs for the requisition of supplies. In addition, she will be responsible for overseeing the hiring and assignment of all personnel. She will review financial transactions and monitor our budget to ensure efficient operation and to ensure expenditures stay within budget limitations.

In response to the RFE the petitioner essentially restated the above job description and indicated that the restaurant manager would also play a key role in purchasing and setting up a second restaurant. The petitioner declared that a bachelor's degree in restaurant management, or its equivalent, was required for the position, making it a specialty occupation.

The director determined that the proffered position was not a specialty occupation. Referring to an excerpt from the Department of Labor (DOL)'s *Dictionary of Occupational Titles (DOT)* listing the occupation of food service manager with an SVP ("specific vocational preparation") at level 7 – which the petitioner had submitted as evidence that the subject position required a bachelor's degree and 0 to 2 years of experience – the director declared that the petitioner had misinterpreted the rating system and that an SVP of 7 did not equate to a bachelor's degree. As explained by the director, an SVP of 7 means that two to four years of vocational preparation are required – consisting of any combination of vocational training, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs – to perform adequately in a specific job-worker situation. The director also referred to the petitioner's submission of an excerpt from DOL's *Occupational Outlook Handbook (Handbook)* stating that most food service management companies and national or regional restaurant chains hired management trainees from two- and four-year college programs in hospitality management. The director noted that the petitioner did not fall under either business category (food service management company or restaurant chain) and that the *Handbook*, in any event, refuted the petitioner's claim that the proffered position required a bachelor's degree in restaurant management or its equivalent. The director determined that the petitioner failed to establish that the proffered position required at least a baccalaureate degree, that such a degree requirement was common to the industry in parallel positions among similar organizations, or that the position was so complex or unique, or the duties thereof so specialized and complex, that a baccalaureate degree or baccalaureate-level knowledge was required to perform the duties of the position. The director also determined that the beneficiary, whose highest level of education is a high school degree in South Korea, did not have a combination of education, training, and experience in the restaurant business equivalent to a U.S. baccalaureate degree in restaurant management.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the *Handbook, supra*, as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered by CIS are whether the *Handbook* indicates a degree is required by the industry; 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. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook*’s occupational descriptions as a reference, as well as the petitioner’s past hiring practices for the position. See *Shanti, id.*, at 1165-66.

On appeal counsel asserts that the director erred in determining that the DOT’s SVP rating of 7 for food service managers meant that a bachelor’s degree was not required for the proffered position. Counsel contends that DOL has always held that a position with an SVP of 7 could require two to four years of professional experience or, in the alternative, a bachelor’s degree equivalent to two SVP points and up to two years of professional experience. The DOT, however, is not a persuasive source of information about whether a particular job requires a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not specify how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a particular position would require. Most importantly, there is nothing in the DOT entry for food service managers, its SVP rating of 7, and case law interpretation thereof cited by counsel, indicating that a baccalaureate or higher degree in a specific specialty is normally the minimum requirement for entry into a food service manager position, as required for the position to qualify as a specialty occupation under the first regulatory criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I). Accordingly, the director did not err in discounting the SVP information in the DOT.

Counsel argues that the director ignored statements in the *Handbook* that food service companies and restaurants increasingly prefer to hire individuals with a bachelor’s degree in restaurant and food service management for their management positions. Counsel quotes an excerpt from the *Handbook*, 2002-03 edition, reading: “Food service and restaurant chains prefer to hire people with degrees in restaurant and institutional food service management.” Almost identical language appears in the 2004-05 edition, at page 44, with the following additional clause: “but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude.” Counsel cites another excerpt from the *Handbook*, 2002-03 edition: “A bachelor’s degree in restaurant and food service management provides a particularly strong preparation for a career in this occupation.” Counsel neglects to quote additional language immediately following which discusses four-year college programs in restaurant and hotel management and states that “[f]or those not interested in pursuing a 4-year degree, community and junior colleges, technical institutes, and other institutions offer programs in these fields leading to an associate degree or other formal certification.” What the *Handbook* makes clear is that, even if many food service managers have baccalaureate degrees in restaurant or food service management, there is ample opportunity to enter the occupation with credentials short of a four-year baccalaureate degree in the specific specialty. Accordingly, the director did not err in determining that the *Handbook* refuted the petitioner’s argument that a baccalaureate degree was not the normal minimum requirement for entry into the restaurant manager position.

For the reasons discussed above, the record does not establish that the restaurant manager position meets the first alternative criterion of a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

As for the second alternative criterion of a specialty occupation, there is no evidence in the record that a baccalaureate degree in a specific specialty is common to the industry in parallel positions among similar organizations. Nor does the record indicate that the restaurant manager position is so complex or unique

that it can only be performed by an individual with a specialty degree. The duties of the position, as described by the petitioner, closely mirror the *Handbook's* description of a food service manager:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers [T]hey 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.

Handbook, 2004-05 edition, at page 42. Though counsel asserts that the beneficiary will have the added responsibility of assisting the petitioner in setting up a second restaurant, there is no evidence that this task is so complex or unique that it requires the restaurant manager to have a baccalaureate degree in a specific specialty. Thus, the position proffered by the petitioner is that of a typical restaurant manager which, as the *Handbook* makes clear, does not require a baccalaureate degree. Thus, the proffered position does not qualify as a specialty occupation under the second alternative criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Counsel asserts that the position meets the third alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) because the restaurant owner has heretofore performed the services of a restaurant manager and has education and experience equivalent to a U.S. bachelor's degree in restaurant management. The owner's degree was in the field of industrial management from Hanyang University, South Korea, in 1970, after which he assertedly had over nine years of experience as a restaurant manager and six years of experience as the owner/manager of an international trade business. The salient fact, however, is that the restaurant manager position did not previously exist. It is a newly-created position and the petitioner has no hiring history for it. Thus, the petitioner cannot establish that it normally requires a degree or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the record does not establish that the specific duties of the restaurant manager position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. The duties of the position do not exceed the scope of those performed by a typical food service manager, an occupation which does not require a specific baccalaureate degree, as the *Handbook* makes clear. Thus, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons discussed above, the petitioner has failed to demonstrate that its restaurant manager position meets any of the criteria set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A) to qualify as a specialty occupation. The petitioner has not established that the beneficiary will be coming temporarily to the United States to perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), and 8 C.F.R. § 214.2(h)(1)(ii)(B).

As previously discussed, the director also determined that the beneficiary was not qualified to perform the services of a specialty occupation. Since the beneficiary's credentials are relevant only if the proffered

position is found to be a specialty occupation, which is not the case here, the AAO need not further address counsel's arguments with respect to the beneficiary's qualifications.

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

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