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Immigration and Naturalization Service

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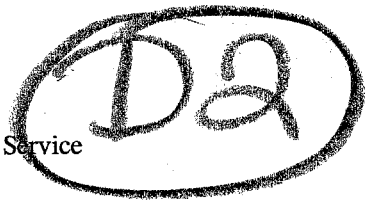

OFFICE OF ADMINISTRATIVE APPEALS
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Washington, D.C. 20536

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

FILE: SRC 01 268 50009 OFFICE: TEXAS SERVICE CENTER DATE: JAN 10 2003

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 USC 110(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which 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 the Service 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 which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Texas Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an investment firm which owns two Denny's restaurant franchises. It employs 110 employees and has a gross annual income of $1,500,000. It seeks to employ the beneficiary as its management analyst for three years.

The acting director denied the petition because she found that the petitioner failed to demonstrate that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

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.

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 knowledge 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.

8 C.F.R. 214.2(h)(4)(ii) further defines the term "specialty occupation" 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.

In a letter submitted with the initial petition, the petitioner stated that, in the proffered position, the beneficiary would:

> Analyze business or operating procedures to devise the most efficient methods of accomplishing work. Plan study

> of work problems and procedures, such as organizational change, communications, information flow, integrated production methods, inventory control, or cost analysis. Gather and organize information on problem or procedures including present operating alternate methods of proceeding. Organize and document findings of studies and prepare recommendations for implementation of new systems, procedures or organizational changes. Confer with personnel concerned to assure smooth functioning of newly implemented systems or procedure. Install new systems and train personnel in application, conduct operational effectiveness reviews to ensure functional or project systems are applied and functioning as designed. Develop or update functional or operational manuals outlining established methods of performing work in accordance with organizational policy.

With the petition, counsel also submitted copies of the beneficiary's diplomas. Those diplomas indicate that the beneficiary received a bachelor's degree in political science at the University of Chittagong, India.

The acting director requested additional evidence pertinent to the proffered position. Specifically, the acting director requested that the petitioner state whether the proffered position requires a degree in a specific area of study, and to specify the specific area of study of the required degree.

In response, counsel submitted a letter in which he stated that, "The baccalaureate degree required for the proffered job does not have to be in any one specific area of study."

With that response, counsel also submitted a report from a credential evaluation service which states that the petitioner's education, coupled with his experience, gives him the equivalent of a bachelor's degree in business administration.

The director denied the petition based on counsel's admission that the proffered position does not require a degree in a specific specialty or the equivalent.

On appeal, counsel cited the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) and the Dictionary of Occupational Titles (DOT) for the proposition that the proffered position requires a minimum of a bachelor's degree.

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 are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Counsel's contention that the proffered position is a specialty occupation is unconvincing. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. 214.2(h)(4)(iii)(A) will be considered separately below.

I. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. 8 C.F.R. 214.2(h)(4)(iii)(A)(1).

The Service often consults the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) when determining whether a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into a particular position.

Counsel has cited the Handbook section pertinent to management analysts for the proposition that the proffered position requires a bachelor's degree. Although the title of the proffered position is management analyst, the duties of the proffered position are unlikely to conform to those described in the Handbook.

The petitioner is an investment company which owns two Denny's restaurants. Operation of the holding company itself is unlikely to require a management analyst. The petitioner must, apparently, have meant that operation of the restaurants would require a management analyst.

Operation of franchised family restaurants, however, does not require the services of a management analyst. Policy decisions including the layout of the restaurants, selection of menu items, procedures for rotating stock, and even the interior and exterior colors, are typically made for the franchisee by the franchisor.

The petitioner has offered no concrete examples of decisions to be made pertinent to the operation of its restaurants which would require the expertise of a management analyst. While the corporation which franchises Denny's restaurants probably either employs one or more management analysts or periodically retains independent management consultants, the most complex position in an individual franchise operation is likely to be the manager.

The Handbook states that food service managers recruit and train employees, order food and schedule delivery, supervise quality and portion size of prepared food, resolve customer complaints, and ensure compliance with health codes. The petitioner states that the duties of the proffered position include analyzing operating procedures, studying problems, exploring alternative methods of operating the business, preparing recommendations for the implementation of new procedures or organizational changes, and training employees in the new procedures. The petitioner has not, however, given any concrete examples of problems to be overcome in the operation of a franchised family restaurant which would not be typically handled by the manager of the business. The proffered position is apparently that of a food service manager at the petitioner's franchised family restaurants.

As to the training necessary for positions in food service management, the Handbook states, at page 56:

> Most food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs. Food service and restaurant chains prefer people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude.

That excerpt indicates that food service manager positions, such as the proffered position, do not require a minimum of a bachelor's degree in a specific specialty. That is consistent with counsel's statement, in response to the Request for Evidence, that: "The baccalaureate degree required for the proffered job does not have to be in any one specific area of study."

II. 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. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

Factors often considered by the Service when determining the industry standard include: whether the DOL's 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." Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D. Minn. 1999) (quoting Hird/Blaker Corp. v. Slattery, 764 F.Supp.2d 872, 1102 (S.D.N.Y. 1991).

The conclusions drawn from the DOL's Handbook pertinent to a degree requirement for the proffered position were discussed in the previous section, and shall not be repeated here. Neither counsel nor the petitioner presented any evidence that any association of food service managers has instituted a degree requirement for membership.

Although counsel has stated that the proffered position involves specialized and complex duties, counsel has provided no concrete examples of duties so specialized and complex that they would require a baccalaureate degree in a specialized field of study.

III. The employer normally requires a degree or its equivalent for the position. 8 C.F.R. 214.2(h)(4)(iii)(a)(3).

The petitioner has not presented evidence that it normally requires a degree or its equivalent for the proffered position or that it has ever filled the proffered position.

IV. The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. 214.2(h)(4)(iii)(A)4).

Again, although counsel alleges that the duties of the proffered position are so specialized and complex that they require a bachelor's degree, he has given no concrete description of any specialized and complex duties to be performed by the beneficiary. The evidence of record does not demonstrate that the duties of the proffered position are more specialized or complex than other food service manager positions.

Based upon the evidence in the record, the petitioner has not established that the proffered position is a specialty occupation. The critical element is not the title of the position, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as a minimum for entry in the occupation as required by the Act. The Service must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. Cf. Defensor v. Meissner, 201 F3d 384 (5th Cir. 2000). In this case, counsel has stated that the practice of the proffered position does not require the attainment of a bachelor's degree in

a specific specialty, and the other evidence of record supports that statement.

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.