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**U.S. Department of Justice**

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

*OFFICE OF ADMINISTRATIVE APPEALS*
*425 Eye Street N.W.*
*ULLB, 3rd Floor*
*Washington, D.C. 20536*

FILE: SRC 01 061 56182 OFFICE: TEXAS SERVICE CENTER DATE: JAN 22 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]

PUBLIC COPY

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 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 a fuel retailer with more than 3,000 employees and an unreported gross annual income. It seeks to employ the beneficiary as the general manager of a Knoxville, Tennessee outlet for two and one half years.

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

On appeal, counsel submits a copy of a section of the Occupational Outlook Handbook, a brief, a copy of the director's request for evidence, and a copy of the petitioner's response to that request.

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 which accompanied the initial petition, the petitioner stated that the beneficiary is expected to maintain financial reports to company specifications, to participate in site marketing

and sales, and to oversee employees at the retail outlet he is to manage. The petitioner stated that, due to the complex and specialized nature of the proffered position, the petitioner normally requires that general managers have, at a minimum, a bachelors degree in hotel management or a closely related field.

The petitioner submitted copies of the beneficiary's diplomas and transcripts with the petition. Those documents show that the beneficiary has a bachelors of science degree in hotel-restaurant/institutional management from a United States university.

The director requested the petitioner to submit additional evidence pertinent to the proffered position. Specifically, the director requested evidence that a person without a bachelor's degree in hotel management would be unable to manage one of the petitioner's retail outlets.

In response, the petitioner submitted a letter in which he asserted that the proffered position encompasses a broad range of duties including accounting, inventory, marketing, management, operations, operations research, product research and development, market analysis and personnel management. The petitioner further stated that the position involves management of an entire operation, not just the retail business, and that the beneficiary's retail outlet sites contain multiple restaurants.

The director denied the petition on the basis that the petitioner did not establish that the proffered position is a specialty occupation.

On appeal, counsel submits a brief. Counsel contends that the evidence demonstrates that the proffered position is a specialty occupation and presents five statements in rebuttal.

First, counsel notes that the decision referred to section 214(i)(1) of the Act, which defines the term "specialty occupation." Counsel states that the director did not request any evidence from the petitioner regarding that section of the statute, and that reliance upon that section without requesting evidence pertinent to it was in error.

Second, counsel notes that the director paraphrased, rather than quoted from, a section of the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) in stating that no sweeping requirement for a bachelor's degree in a specific specialty exists for managerial positions, and that the director solicited no evidence from the petitioner to oppose that finding. Counsel contends that reliance upon that passage of the Handbook without requesting the petitioner's input pertinent to it was in error. Counsel further asserts that the Handbook demonstrates that

various managerial positions may require a degree in a specific specialty, depending upon the nature of the specific enterprise.

Third, counsel notes that the director found that insufficient evidence had been submitted to demonstrate that the proffered position is a specialty occupation, and states that the director never requested evidence that the proffered position is a specialty occupation. Counsel admonishes the director for reaching such a conclusion without requesting evidence pertinent to whether the proffered position is a specialty occupation.

Fourth, counsel notes that the director stated that no evidence exists in the record that the beneficiary would, in the proffered position, manage professionals. Counsel states that the director never requested any evidence that the beneficiary would manage professionals. Counsel again notes that the director did not request information or evidence pertinent to whether the beneficiary would manage professionals.

Counsel notes that the director found that the record contains insufficient evidence to demonstrate that:

> the beneficiary would be engaging in any of (the duties of the proffered profession) to a deep and sophisticated enough extent to justify the need for a baccalaureate degree in a focused area of study.

Counsel asserts that the director had no evidence in support of that statement.

Fifth and finally, counsel submits a letter from the division human resource manager reiterating that a candidate would be unprepared for the proffered position absent the training received while obtaining a specialized degree. That letter further states that the petitioner "has always required (its) General Managers to possess a Bachelor's degree in Hotel/Restaurant Management, Business Management, Institutional Management, or (an)other closely related field."

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. In this matter, the passage of the Handbook pertinent to general managers, cited by the director, and subsequently referred to by counsel, is not closely related to the proffered position. That section refers to general managers of corporations, nonprofit institutions, or other similar organizations.

The petitioner has never precisely described the nature of the Knoxville operation at which it proposes to employ the beneficiary. However, it appears to combine a Gas-and-Go, two or more fast food outlets which the beneficiary may operate, and possibly a convenience store, on one site. The Handbook describes no position which precisely parallels the proffered position.

The Handbook does, however, describe Sales Worker Supervisor positions, at pages 371 to 373, and Food Service Manager positions, at pages 55 to 57. The section on Sales Worker Supervisors does not indicate that the position requires bachelors degree. Of the Sales Worker Supervisors who do hold either two- or four-year degrees, most have degrees in liberal arts, social sciences, business, or management. Thus, the Handbook indicates that even those managers who hold degrees do not necessarily have bachelors or higher degrees, nor degrees in a specific specialty related to their position.

The section of the Handbook pertinent to the Food Service Managers states that:

> 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 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 interest and aptitude. Some restaurant and food service manager positions, particularly self-service and fast food, are filled by promoting experienced food and beverage preparation and service workers.

That passage indicates that most chains prefer college graduates, though associates degrees are acceptable, rather than bachelors degrees. It further indicates that a degree in a specific specialty pertinent to the position is unnecessary. Finally, as to fast food positions, which the proffered position apparently entails, the Handbook indicates that no degree is necessary for entry into the field.

The proffered position appears to entail both retail management and food service management duties. The Handbook indicates that neither of those two positions which, together, comprise the proffered position, requires a bachelors degree in a specific specialty or the equivalent. As such, the Handbook offers no support for the petitioner's position, that the proffered position requires a minimum of a bachelors degree in a specific specialty or the equivalent.

**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 lack of any support from the Handbook for the proposition that the proffered position requires a degree was discussed in the previous section, and shall not be repeated here. Neither counsel nor the petitioner presented any evidence that any association of employees in parallel positions has instituted a degree requirement for membership.

Nothing in the description of the duties of the proffered position indicates that the petitioner's business is especially complex or unique, such that it 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).**

In the letter, dated December 14, 2000, which accompanied the petition, a division human resource manager for the petitioner stated that "we normally require our General Managers to have, at a minimum, a Bachelor's Degree in Hotel Management or a closely related field." In a letter, dated May 18, 2001, in response to the Request for Evidence, a different division human resource manager for the petitioner stated, "(i)n fact, we have always required our General Manager's (sic) to possess a Bachelor's degree in Hotel/Restaurant Management, Business Management, Institutional Management, or (an)other closely related field." On appeal, in a letter dated July 24, 2001, that second human resource manager reiterates, "we have always required our General Managers to possess a Bachelor's degree in Hotel/Restaurant Management, Business Management, Institutional Management, or (an)other closely related field."

However, the petitioner submitted no evidence in support of that assertion. The petitioner might, for instance, have listed the names of current and past managers with the colleges they attended, the degrees they earned there, and their major courses of study, but did not. Going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

In addition, the employment section of the petitioner's website <http:\\jobsearch.pilot.newjobs.com\> states the following about travel center manager positions:

> As a travel center manager you will be responsible for overseeing grocery, convenience, fuel, and food operations. Candidates for a travel center manager's position should bring 2+ years of retail management experience across a variety of industries - convenience store, grocery, big box retailer, fuel station etc. In this position, you will be responsible for hiring, training, and developing your employees in a 24-hour operation.

The proffered position is apparently a travel center manager position. The description of that job mentions an experience requirement, but does not mention any degree requirement.

Currently, the website is advertising to fill 61 manager positions, including 17 travel center manager positions. None of those job listings mentions a degree requirement. The petitioner states that the position requires a bachelor's degree in a specific specialty or the equivalent. The evidence strongly suggests that it does not.

**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).**

The petitioner and counsel have repeatedly stated that the duties of the position are so specialized and complex that they may not be performed by anyone without a bachelor's degree in hotel management or a closely related field. The duties of the proffered position that the petitioner claims are unique or complex include maintaining financial reports, participating in site marketing and sales, and overseeing employees.

The meaning of "participate in site marketing and sales" is unclear. If it means that the beneficiary would participate in marketing and sales at the retail outlet he would manage, rather than marketing sites, this and the other two duties of the position are routinely accomplished by people without specialized education.

The duties described do not support the contention that the proffered position is so complex that it requires a bachelor's degree.

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, the petitioner has not shown that the proffered position requires the attainment of a bachelor's degree in a specific specialty.

The burden of proof in these proceedings always 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.