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20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship and Immigration Services

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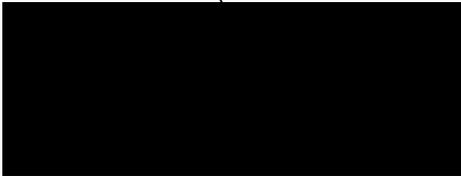
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FILE: SRC 04 046 50390 Office: TEXAS SERVICE CENTER Date: **AUG 25 2005**

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The director of the Texas 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 chain operating in South Florida, with 40 employees. It seeks to employ the beneficiary as a food quality control manager 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 she determined the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) the petitioner's response to the director's request for evidence; (3) the director's denial letter; and (4) the Form I-290B, with a letter from counsel, and new and previously submitted documentation. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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) 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 nor 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.

Although the Form I-129 indicates the petitioner is seeking the beneficiary’s services as an agronomist-food scientist, the petitioner’s letter of support states that it wishes to employ the beneficiary as a food quality control manager. Evidence of the beneficiary’s duties includes: the Form I-129 and a December 2, 2003 letter of support from the petitioner accompanying the Form I-129.

At the time of filing, the petitioner described the beneficiary’s duties as follows:

[I]mproving existing methods and developing new methods and procedures for preserving, processing, storing and delivering food products to ensure that they are healthy, safe, palatable, and meet consumer demands.

Although notified by the director’s request for evidence that it had submitted no description of the actual duties of the proffered position, the petitioner failed to provide additional information regarding the beneficiary’s day-to-day responsibilities. Accordingly, the above description remains the only information offered by the petitioner with respect to the duties of the proffered position.

To make its determination whether the employment just described qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor’s *Occupational Outlook Handbook (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. Slattery*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As the petitioner has identified its proffered position as a food scientist, the AAO first turns to the description of this occupation in the 2004-2005 edition of the DOL *Handbook*. According to the *Handbook* at pages 146-147, a food scientist:

[p]lays an important part in maintaining the Nation's food supply by ensuring agricultural productivity and the safety of the food supply

. . .

[F]ood scientists and technologists usually work in the food processing industry, universities, or the Federal Government, and help to meet consumer demand for food products that are healthful, safe, palatable, and convenient. To do this they use their knowledge of chemistry, physics, engineering, microbiology, biotechnology, and other sciences to develop new or better ways of preserving, processing, packaging, storing and delivering goods. Some food scientists engage in basic research, discovering new food sources; analyzing food content to determine levels of vitamins, fat, sugar, or protein; or searching for substitutes for harmful or undesirable additives, such as nitrites. They also develop ways to process, preserve, package, or store food according to industry and government regulations Other food scientists enforce government regulations, inspecting food processing areas and ensuring that sanitation, safety, quality and waste management standards are met. Food technologists generally work in product development, applying the findings from food science research to the selection, preservation, processing, packaging, distribution, and use of safe, nutritious, and wholesome food.

Although the petitioner has stated that its proffered position is that of a food scientist, its limited description of the position's duties does not allow the AAO to conclude that the proffered position falls within the occupation just described, nor to compare it, in any meaningful way, with other food service employment. Without evidence of the specific tasks to be performed by the beneficiary as a food quality control manager, the AAO is unable to determine either the nature of the petitioner's proffered employment or whether it would require the beneficiary to hold a degree or the equivalent of a degree in a related field. Accordingly, the petitioner cannot establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

On appeal, counsel contends that his cover letter submitting the Form I-129, as well as the Form I-290B, state the proffered position requires a degree and, therefore, establish the proffered position as a specialty occupation under the first criterion. He asserts that these statements are supported by submitted materials from the *Handbook* and an expert opinion provided by a food process engineer under the auspices of the Foundation for International Services. The evidence provided by counsel is not persuasive.

The record contains no material from the *Handbook*. However, the absence of this documentation does not materially affect the petitioner's ability to establish its proffered position as a specialty occupation. The *Handbook's* discussion of an occupational title similar to that of the proffered position cannot, without a

meaningful description of the proffered position's duties, establish it as a specialty occupation. As previously noted, it is not the title of a position, but its duties, that are key in determining the nature of the employment.

The record does contain an evaluation of the beneficiary's qualifications to perform the duties of the proffered position, submitted in response to the director's request for evidence. This evaluation, authored by a food process engineer, also states that the proffered position is that of a food science and technology professional, and requires the beneficiary to hold a degree in food science and technology or a related food industry field. However, while the food process engineer's opinion is relevant to these proceedings, it cannot establish the proffered position as a specialty occupation for the reasons discussed below.

The opinion has been offered without evidence to substantiate the author's stated expertise to evaluate the nature of the proffered position. Although this individual asserts his evaluation of the petitioner's employment is based on his professional and academic experience in the field of food science, that experience is not independently established. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *See 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 evaluation also lacks an adequate factual foundation and a meaningful analysis. While the author stated that he had considered the "principal duties and responsibilities" of the proffered position, he did not specify what those duties were, nor did he offer any analysis of them. Instead, the evaluation provides a general discussion of the work of food science professionals. It does not indicate that the job description on which the author relied consisted of more than the brief statement of duties provided by the petitioner at the time of filing, a description already found to be insufficient to establish a degree requirement. Where an expert opinion is not in accord with other information or is in any way questionable, CIS may discount or give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). The AAO has considered the professor's opinion but, for the reasons just discussed, has found it to carry little evidentiary weight.

To establish a proffered position as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. Again, the only evidence in the record that responds to the requirements of the second criterion is the evaluation provided by the food process engineer. In reaching his conclusions regarding the proffered position's degree requirement, the author stated that he had considered "similar positions and food business situations with similar size organizations." However, while making this statement, the author failed to identify any of the organizations or the positions he considered or to describe the comparative analysis used to reach his conclusion regarding the position's degree requirement. As a result, the evaluation's statements with regard to industry standards have little evidentiary weight. *Matter of Caron International*. Accordingly, the proffered position cannot be established as a specialty occupation under either prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine a petitioner's ability to meet the third criterion, the AAO normally reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. In this case, the petitioner has submitted no evidence that would allow CIS to make a determination as to its normal hiring practices and, therefore, is unable to establish its proffered position as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform those duties is usually associated with the attainment of a baccalaureate or higher degree. However, as previously discussed, the petitioner has provided no listing of the specific duties of its proffered position and, therefore, no analysis under the fourth criterion is possible. As a result, the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets any of the four alternative criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A) and cannot establish its proffered employment as a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

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.