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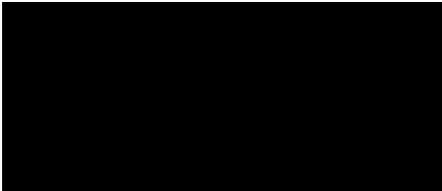
FILE: EAC 03 229 54333 Office: VERMONT SERVICE CENTER Date: **MAR 10 2005**

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 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 service center director 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 and seeks to employ the beneficiary as a kitchen manager. The petitioner 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 does not qualify as a specialty occupation. On appeal the petitioner submits a brief and additional information indicating that the offered position qualifies as a specialty occupation.

The issue to be discussed in this proceeding is whether the proffered position qualifies as a specialty occupation.

Section 101(a)(15)(H)(i)(b) of 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 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:

[A]n 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 are 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) the 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) the Form I-290B with counsel’s brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary’s services as a kitchen manager. Evidence of the beneficiary’s duties includes the I-129 petition with attachment and the petitioner’s response to the director’s request for evidence. According to this evidence the beneficiary would: oversee and manage all aspects of food preparation and presentation from the kitchen; oversee and supervise the kitchen, chefs, and wait staff to ensure quality and consistency; supervise, train, and schedule kitchen personnel; monitor and maintain bi-weekly employee records; recommend various personnel actions, including, but not limited to, terminations, performance appraisals, promotions, and vacation schedules; develop budgets and purchasing projections to assist in developing an overall financial report; authorize menu selections for special occasion events and catered receptions; acquire kitchen equipment and purchase necessary supplies for food preparation; consult with vendors and wholesalers concerning inventory purchases, product items, menu planning, and product availability; implement and oversee extensive customer service training; and conduct performance evaluations for subordinate kitchen personnel. The petitioner requires a minimum of a bachelor’s degree in food service management for entry into the proffered position.

The petitioner initially petitioned to employ the beneficiary as a kitchen manager for one restaurant noting that he would supervise a staff of 10 employees. In its response to the director’s request for evidence, the petitioner expanded the scope of the proffered position noting that the beneficiary would manage the kitchen operations of two restaurants. On appeal, counsel states that the beneficiary will provide management in three, and possibly four restaurants. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position’s title or its associated job responsibilities. The petitioner must establish that the position that was offered to the beneficiary at the time the I-129 petition was filed is a specialty occupation. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. In this instance, the petitioner has substantially changed the scope of duties and responsibilities associated with the proffered position subsequent to filing the initial petition.

The expanded duties of the offered position will not, therefore, be considered and the petition will be adjudicated based upon the duties of the position as detailed when the petition was initially filed.

Upon review of the record, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations. The duties of the proffered position are essentially those noted for food service managers. The *Handbook* notes that a bachelor's degree in restaurant and food service management provides strong preparation for a career in this occupation. Candidates are recruited, however, from two and four-year college hospitality management programs, as well as from technical institutes and other institutions offering programs leading to associate degrees or other formal certification. Thus, the petitioner has not established the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), that a baccalaureate or higher degree, or its equivalent, is normally the minimum requirement for entry into the position.

The petitioner has also failed to establish that a degree in a specific specialty is common to the industry in parallel positions among similar organizations. In support of this proposition the petitioner submits copies of job advertisements and two opinion letters. The eight advertisements submitted, however, do not establish that a minimum of a bachelor's degree in a specific specialty is common to the industry as a whole. The majority of the advertisements submitted do not state that a bachelor's degree in any specific specialty is required for entry into the position, or simply indicate that a degree is preferred, rather than required for entry into the position. The two opinion letters apparently are based on the writer's personal experiences and provide no other basis for the opinions. Both opinions indicate that many restaurants require a degree for management personnel, but do not establish that a degree is standard in the industry for entry into the proffered position. The evidence submitted is insufficient to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner does not state that it normally requires a degree in a specific specialty for the offered position, and offers no evidence in this regard as the position is new with the petitioner. The petitioner has, therefore, failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the nature of the specific duties is not so specialized or complex that knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, nor are the duties so complex or unique that they can be performed only by individuals with a degree in a specific specialty. The duties to be performed are routine in the industry for kitchen managers and similar employees. The petitioner asserts that the duties of the position are professional in nature and require a baccalaureate level education as indicated by the SVP rating assigned to the position by the Department of Labor's *Dictionary of Occupational Titles (DOT)*. The petitioner's assertions regarding the DOT's SVP rating for the offered position are unpersuasive. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. The SVP classification does not describe how those years are to be divided among training, formal education, and experience, nor does it specify the particular type of degree, if any, that a position would require. The petitioner also asserts that the beneficiary will supervise other management personnel having a baccalaureate level education. The petitioner did not submit, however, any evidence to establish that any of the 10 employees the beneficiary will supervise have a bachelor's degree or that the duties of their positions require a degree in any specific specialty. The petitioner has failed to establish either of the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) or (4).

The petitioner has failed to establish that the offered position meets any of the criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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 and the appeal shall accordingly be dismissed.

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