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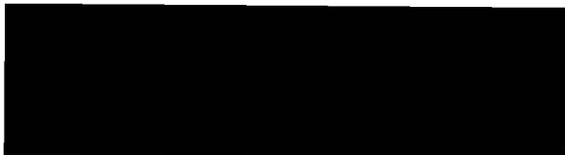
FILE: EAC 04 213 51467 Office: VERMONT SERVICE CENTER Date: **SEP 13 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 operates a food and catering business. It seeks to employ the beneficiary as a food and beverage manager. Accordingly, 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 record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's August 10, 2004, request for evidence (RFE); (3) prior counsel's October 4, 2004, response to the director's RFE; (3) the director's March 25, 2005, denial letter; and (4) the Form I-290B and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

On March 25, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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:

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.

The petitioner states that it is seeking the beneficiary's services as a food and beverage manager. Evidence of the beneficiary's duties includes: the Form I-129; the petitioner's undated list of job responsibilities for the proffered position; and prior counsel's October 4, 2004 response to the director's RFE.

At the time of filing, the petitioner stated that the beneficiary would be required to:

1. Inspect food and services to ensure that it meets the company, state[,] and local health laws.
2. Analyze information concerning facilities operation, such as daily food sales, patron [a]ttendance, etc.
3. Prepare budget and to maintain cost control of the operations.
4. Inspect and taste prepared food to maintain quality standards and sanitation regulations.
5. Plan menus and confer with personnel, to direct dining room, bar[,] and banquet operations.

On August 10, 2004, the director requested, among other things, a brochure or other documentation describing the company and the nature of its business, evidence that the petitioner hired individuals with a baccalaureate degree in a specific field of study as a standard minimum requirement for the job offered, a copy of the job announcement used by the petitioner to hire for the position of food and beverage manager, how the duties of the food and beverage manager were so complex as to require a four-year baccalaureate degree in a related field of study, and a copy of the petitioner's organizational chart.

In an October 4, 2004 response, prior counsel submitted: a letter from the managing director of the Spice Grill restaurant indicating that restaurants must hire operations managers who possess at a minimum a bachelor's degree in a related field and a description of the duties that an operations manager typically provided; a letter from the personnel manager of the Hotel Blue Hills International indicating that it had hired an individual for the position of operations manager and providing that individual's foreign credentials to establish the individual possessed the equivalent of a bachelor's degree; educational evaluations of two of the petitioner's employees who counsel states¹ held the position of food and beverage manager showing the individuals had the equivalent of bachelor's degrees; letters of reference for an individual who had undergone food and beverage training; and several letters pertaining to _____ in support of this individual's proposed position as operations manager.

Prior counsel asserted that the position of food and beverage manager qualified as a specialty **occupation**. Prior counsel provided a lengthy description of duties that resembled the duties submitted for _____, the individual considered for the position of operations manager. Prior counsel also included the petitioner's organizational chart showing a president and chief executive officer, a vice-president reporting to the president, and an operations manager, food and beverage manager, "HRD" manager, and marketing manager reporting to the vice-president. The organizational chart did not identify any individuals holding any of the positions listed.

On March 25, 2005, the director denied the petition, determining that the revised list of duties submitted in response to the director's RFE were duties normally associated with the positions of human resources development, marketing manager, and operations manager. The director observed that the letters submitted from other food industry firms pertained to the position of operations manager, not the proffered position of food and beverage manager. The director noted, in addition, that the record did not contain evidence of the size or scope of the other businesses, so that it could not be determined that the restaurants were similar to the petitioner. The director further noted that the Department of Labor's *Occupational Outlook Handbook (Handbook)* reports that the position of a food service manager did not require that individuals in the position obtain a four-year degree. The director concluded: that the record did not establish that a baccalaureate or higher degree, or its equivalent is normally the minimum requirement for entry into the proffered position; that similar businesses require the services of individuals with baccalaureate degrees in parallel positions; that the petitioner had hired or currently employed individuals with baccalaureate or higher degrees in a specialized area for the proffered position; or that the duties of the job offered are so specialized and complex that a baccalaureate degree is necessary.

On appeal, counsel for the petitioner asserts that the petitioner's past violations of health standards compelled the petitioner to seek an academically qualified candidate for food and beverage manager (counsel refers to this same position as a catering and banquet manager in the next paragraph of his brief) to alleviate this

¹ Counsel asserts that _____ and _____ held the position of food and beverage manager for the petitioner. The record provides a copy of _____ Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, showing Mr. _____ earned \$5,200 in 2003 while employed by the petitioner; the record does not document Mr. _____ position. The record does not include evidence that _____ was employed as a food and beverage manager. The record does indicate that _____ once held the position of operations manager and that he signs on behalf of the petitioner as its vice-president.

problem. Counsel attaches copies of the health code violations and numerous job announcements for positions including food and beverage manager, food and beverage director, general manager, restaurant manager, and retail manager. Counsel acknowledges that there is no legal requirement that requires food and beverage managers to hold a degree but that high standards often require a degree for this position. Counsel asserts that the job announcements submitted show that a number of restaurants and food service agencies require a degree for similar positions. Counsel notes that the petitioner plans to expand and has "decided to play it smart and bring in a technically qualified person."

Counsel's assertions are not persuasive. First, prior counsel's statement submitted in response to the RFE sought to change the duties of the proffered position from "food and beverage manager" to "operations manager." 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 offered to the beneficiary is a specialty occupation. *See Matter of Michelin Tire Corp.*, 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. Moreover, the AAO observes that the record suggests that the petitioner is attempting to employ a different individual in the position of operations manager. The AAO will not agree to the petitioner's proposed change in job duties.

Second, the AAO agrees with the director's determination that the record in this matter fails to establish that the proffered position of food and beverage manager is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The *Handbook* states the following with regard to the employment of food service managers, the position that mostly closely resembles the duties of the proffered position:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they 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.

The *Handbook* continues:

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality or service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service.

The AAO concurs with the director's determination regarding the *Handbook's* report that food service managers do not require a bachelor's degree in a specific specialty. Accordingly, the petitioner cannot establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the first prong of the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations - counsel on appeal submits numerous job postings for various positions including, food and beverage manager, food service manager, general manager, restaurant manager, and retail manager. However, the majority of the job announcements that relate to the position of food and beverage manager do not indicate that a degree is required for the position. Moreover, the few job announcements that indicate a degree and experience is required also provide lengthy job descriptions demonstrating the complexity of the position listed. Further, the petitioner has not provided sufficient evidence to establish that it is comparable in size, number of employees, or nature of work as the entities advertising for the various positions listed in the job announcements. The job announcements provided do not establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The AAO notes the letters submitted from the Spice Grill restaurant and the Hotel Blue Hills International and their content. A review of the content suggests that these letters were submitted in order to establish that the duties of an operations manager in similar organizations required the services of a degreed individual. As determined above, the proffered position in this matter is for a food and beverage manager, not an operations manager. Thus the relevance of these letters to this matter is questionable and will not be considered.

The petitioner has also failed to establish the second prong of the second criterion. The record does not contain evidence that would show the proffered position is so complex or unique that only an individual with a degree can perform the position. The description of the duties of the proffered position is that of a food service manager, an occupation that does not require a bachelor's degree in a specific specialty.

The petitioner has, accordingly, failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The petitioner's evidence regarding its employees suggests that it has hired individuals for the position of operations manager. The record does not contain evidence supporting the petitioner's claim that it employed only degreed individuals in the position of food and beverage manager. As such, it is not possible to conclude that the petitioner has previously required a degree or its equivalent for the proffered position. Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The duties of the proffered position do not exceed the scope of those performed by a food service manager, an occupation that does not require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4); namely, that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the occupation of a food service manager is an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. The petitioner has provided a general description of the duties associated with the proffered position but has not explained how or offered documentary evidence to substantiate that the nature of the duties is specialized and complex, beyond the routine duties of a food and beverage manager. Accordingly, the petitioner has not proved that the position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel's claims on appeal regarding the petitioner's expansion and that the petitioner requires the services of a technically qualified person do not aid in establishing that the proffered position is a specialty occupation. First, counsel does not provide documentary evidence to demonstrate the petitioner's intention to expand. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Second, neither counsel nor the petitioner have established that the proffered position's duties require the services of anyone other than a non-degreed employee to perform routine oversight of the food and beverages portion of the petitioner's operation.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner submitted a June 18, 2004 evaluation of the beneficiary's education and work experience by IndoUS Technology & Educational Services, Inc. The evaluation notes that the beneficiary completed a three-year degree in Hotel Management at Bangalore University located in India. The evaluator first, claims that this three-year degree with 60 credits in food services and Hotel Management is the equivalent to a Bachelor's Degree in Food Services and Hotel Management from an accredited college or university in the United States of America. The evaluator then adds that the beneficiary has 3.5 years of progressively responsible work experience in the field of food and beverage management and a certificate from the Department of Employment and Training Karnataka State Board of Examinations, India of enrollment in a national apprenticeship program in Cook General at Taj Residency. The evaluator concludes, based on the beneficiary's foreign three-year degree, certificate of apprenticeship, and work experience, that the beneficiary has the equivalent of a bachelor's degree in food services and hotel management from an accredited college or university in the United States of America.

The AAO cannot agree. It is not possible to determine from the evaluation whether the evaluator is relying solely on the beneficiary's foreign three-year degree to establish that the beneficiary has obtained the equivalent of a four-year degree in the United States or whether the evaluator is relying on the beneficiary's work experience and a certificate of employment and training in addition to the beneficiary's three-year foreign degree, to establish that the beneficiary has obtained the equivalent of a four-year degree in the United States. Regardless, the AAO finds that the beneficiary's three-year foreign degree is not equivalent to a four-year degree issued by an accredited college or university in the United States. The evaluator has provided no explanation or rationale for acceptance of a three-year foreign degree in place of a four-year

degree issued by an accredited United States college or university. Moreover, in *Matter of Shah*, 17 I&N Dec. 244 (Comm. 1977), the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. Further, a petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The petitioner has not provided the necessary evidence to establish that the beneficiary is qualified to perform the services of a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.