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U.S. Department of Homeland Security
Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
425 I Street, N.W.
Washington, DC 20536

PUBLIC COPY



NOV 19 2003

File: LIN 01 227 54983 Office: NEBRASKA SERVICE CENTER Date:

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:



**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

INSTRUCTIONS:

This is the decision 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.

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 that 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 Citizenship and Immigration Services (CIS) 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 that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The matter will be remanded to the director for further consideration of the qualifications of the beneficiary and entry of a new decision.

The petitioner is a luxury hotel and member of the [REDACTED] group of gourmet restaurants, small inns, exclusive resorts and historical hotels. It has 325 employees and a gross annual income of \$18,500,000. It seeks to temporarily employ the beneficiary as an assistant hotel manager/food and beverage for a period of three years. The director determined that the proffered position was not a specialty occupation.

On appeal, counsel cites to *Matter of Sun* to establish that a hotel manager is a specialty occupation. Counsel also refers to documentation already submitted with regard to the hiring practices for parallel positions in similar luxury hotels and resorts.

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 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 field 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.

The issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Nebraska Service Center on July 24, 2001, the petitioner described the duties of the proffered position as follows:

1. Restaurant [m]anagement: Ensure that the Food & Beverage Department is prepared for all scheduled meals and events including coordination of staff, physical facilities, and foodservice. Review new menus, new menu items tailored to guests, and seasonal items and make suggestions and revisions; review wine lists for special meals and make new wine purchases based on knowledge of market prices and reviews of wines; coordinate with Executive Chef regarding food service operational questions such as scheduling of staff members or needs for dining room banquet set-ups or training of staff; and coordinate with [g]eneral [m]anager and [a]ssistant [g]eneral [m]anager regarding the hotel's good and beverage needs.
2. Food and [b]everage [a]dministration: oversee dining room during meal service including management of dining room manager or dining room assistant (who in turn manage wait staff), and manage room service and special events. Ensure that restaurant operates in keeping with principles of sanitation and quality control for an award-winning property.
3. Human [r]esources [m]anagement: Responsible for hiring, firing, training, and promotion. Create work schedules, establish performance standards, organize weekly training sessions for staff on the Little Nell's "Standard Operating Procedures" (i.e., nutrition and sanitation, wine service), edit and update staff manual.

4. Inventory [c]ontrol: Implement oversight systems for supplies of wine, beer, and liquor; coordinate with Executive Chef regarding supplies of foodstuffs, review and authorize supply purchases, and ensure that inventory is maintained in keeping with principles of sanitation and inventory control.
5. Financial management/[b]udgeting: Prepare financial plan, budget and revenue goals for The Little Nell's foodservice operations, update same on weekly and monthly basis, and devise operational plan to meet budget revenue goals. Authorize restaurant expenditures and prepare budget reports to submit to [g]eneral [m]anager and [c]hief [o]perating [o]fficer.
6. Quality Assurance: Accountable for ensuring that all food and beverage operations are carried out in accordance with established quality control and customer service standards which have made The Little Nell one of the top resorts in the United States.

The petitioner also submitted extensive documentation on the nature of its hotel operations. It described the [REDACTED] business as an international group of award-winning, financially successful, gourmet restaurants, small inns, exclusive resorts and historical hotels. It also stated that it was one of approximately 60 Relais & Chateaux members in North America. The petitioner stated that it had received numerous awards, among them, the designation of Grand Award in the August 1998 issue of *The Wine Spectator*. In addition, the petitioner stated that in 1997, *Gourmet Magazine* rated its restaurant number one in Colorado and number 13 in the United States in the magazine's annual readers' survey. The petitioner was also awarded Mobil's Five Star designation and the American Automobile Association's (AAA) Five Diamond award. The petitioner submitted documentation with regard to [REDACTED] properties in the United States, the petitioner's AAA Five Star lodging designation, and the petitioner's Five Star designation by Mobil. The petitioner also submitted a report published in September 2000 and entitled "Andrew Harper's Hideaway Report." This report listed the petitioner as number seven in its readers' survey of best U.S. resort hotels. Finally the petitioner submitted a letter from Dr. Brian Terry, a professor at Johnson and Wales University as to the academic requirements for the proffered position.

On October 17, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested a detailed statement on the beneficiary's proposed duties and responsibilities and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested more evidence with regard to establishing any of the four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). In particular, the director requested more information with regard to the degree

requirement being common to the hotel management industry in parallel positions among similar organizations. Finally, the director requested more evidence with regard to other persons employed in similar positions by the petitioner.

In response, the petitioner resubmitted the letter from Dr. [REDACTED] University, and submitted six new letters from the following groups or hotels:

- American Automobile Association(AAA). The AAA Director of Tourism Information Development stated: "for properties at the Five Diamond Level, I can confirm that it is a standard practice when hiring for managerial positions to consider only candidates who possess a [b]achelor's degree in one of the hospitality management fields, or an equivalent combination of education and experience." The letter added: "While this industry standard may not apply to all hotel and restaurant properties in the U.S., it categorically applies to properties at the Five Diamond level."
- [REDACTED] North America. The president of the North American group of small, luxury inns, stated: "It is understood within the hospitality industry that restaurant management professionals at high-end hotels, restaurants and inns must satisfy an extraordinarily demanding clientele in performing their duties, and [these professionals] are expected to possess a formal university degree in hotel/restaurant management or culinary arts as well as prior management experience."
- The Restaurant School at Walnut Hill College. The dean of academics stated: "[A] bachelor's degree, or equivalent, is required to fill restaurant management positions in this caliber of hotel/restaurant because of the sophistication of the particular duties required by the award-winning operations at this level of property."
- The Mayflower Inn, a Five Star, Five Diamond [REDACTED] property. The general manager of the Mayflower Inn described the nature of the assistant restaurant manager position and stated: [T]he assistant restaurant manager is [a] key manager who is required to reference a university academic book of knowledge on accounting principles, human resources management, budgeting, purchasing, cost control, and restaurant operations. [This] academic frame of reference reflects a breadth of knowledge that is usually obtained only through a university degree program in hotel or restaurant management[.]

- The Fearington House, another Five Star, Five Diamond Relais & Chateaux property in Pittsboro, North Carolina. Its general manager stated that "an individual serving in an [a]ssistant [r]estaurant [m]anager position for an award-winning property at the level of The Fearington House must possess a [b]achelor's degree, or equivalent, in restaurant management or a hospitality management field. The position of [a]ssistant [r]estaurant [m]anager at such a property is an operations position that requires management skills."
- The White Barn Inn, another Five Diamond, [REDACTED] property in Kennebunkport, Maine. The owner of the White Barn Inn and five other properties stated that "elite properties such as [the petitioner] regularly utilize the full-time services of restaurant management professionals in their day-to-day operations. . . and that these managers are key professionals with formal training in restaurant management."

Counsel also submitted a breakdown of the beneficiary's duties and the percentage of time to be spent in each job duty.

On February 26, 2002, the director denied the petition. The director found the proffered position to be analogous to the restaurant and food service manager classification described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, which did not appear to require a baccalaureate degree in a specialized area for entry into the profession.

On appeal, counsel resubmits the seven letters listed previously and states: "the . . . expert opinions . . . conclusively establish the industry standard requiring [b]achelor degrees for managerial-level employees at award-winning, internationally-renowned properties at the very top echelon of the hospitality industry." Counsel also asserts that CIS ignored the letters from the directors of similar properties when it made its decision.

Counsel also asserts that the proffered position is a specialty occupation based on the unique nature of the petitioner's business. Counsel states that only 27 elite properties in the United States, of which the petitioner is one, have received both the Five Star and Five Diamond designations from Mobil and the AAA, respectively.

Upon review of the record, the director correctly classified the proffered position as a food service manager; however, the nature of the petitioner's restaurant appears substantially different from the types of restaurants outlined in the *Handbook* classification. The petitioner is not a food service management

company or a national or a regional restaurant chain. It is a small luxury resort that provides fine dining and lodging to an upscale clientele. The *Handbook* does not address the necessary qualifications for the position of food service manager within such a business enterprise.

With regard to the second criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), factors often considered by Citizenship and Immigration Services (CIS) when determining the industry standard include: whether the *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.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)). As stated previously, the information provided in the *Handbook* is inconclusive. With regard to documentation submitted by the petitioner, the petitioner submitted no job vacancy announcements for parallel positions in similar firms. Nevertheless the petitioner submitted letters from owners or managers of three resort properties listed in the [REDACTED] property register. All three correspondents affirmed that award-winning, internationally renowned small resorts, similar to theirs and the petitioner, would require individuals with baccalaureate degrees in specific hospitality fields for entry into the proffered position. The statements by all three letter writers provide persuasive weight for establishing 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

In addition, in reviewing the nature of the petitioner's business and the prospective duties of the beneficiary, the petitioner has presented a persuasive argument for classifying the position as a specialty occupation, based on 8.C.F.R. § 214.2(h)(4)(iii)(A)(4), namely, 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.

The petitioner's restaurant operation is an upscale dining experience within an award-winning resort. As previously stated, the petitioner is not part of a regional or national chain, but rather is one of a very small group of similar resort properties that have received awards from national U. S. hotel and travel entities. Given the nature of the petitioner's business, the multiple layers of necessary duties with regard to the provision of fine cuisine and wines within an upscale restaurant and resort environment, the level of service typical of an award-winning restaurant, the responsibilities for planning and executing menus featuring international mountain or Alpine cuisine, and the logistical oversight of food and drink inherent to the position of assistant restaurant manager, it does not appear excessive that the petitioner requires a baccalaureate degree in restaurant management or a related field.

The critical element in the analysis of this criterion is not the 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 bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ In the instant petition, the petitioner appears to have met both the statutory requirements as outlined in the Act and the regulatory criteria as outlined in 8 C.F.R. § 214.2 (h)(4)(iii)(A). Therefore the petitioner has established that the proffered position is a specialty occupation.

Beyond the decision of the director, the evidence on the record is not persuasive that the beneficiary is qualified to perform the duties of the proffered position. Pursuant to 8 C.F.R. § 214.2 (h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

1. Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2. Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
3. Hold an unrestricted State license, registration, or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
4. Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In the original petition, the petitioner submitted a one-page

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

educational evaluation document from World Education Services, Inc. The petitioner also submitted copies of the beneficiary's two diplomas from Blackpool and the Fylde College in England. The first diploma is entitled "BTEC Advanced General National Vocational" and was issued by Blackpool and The Fylde College in June 1995. The coursework is identified as hospitality and catering. The second diploma is entitled as "BTEC Higher National Diploma" for coursework in hotel, catering and institutional management. The diploma was issued in June 1997.

With regard to the educational evaluation document, this document lacks corroborating documentation. For example, the limited credential analysis contained in the document states that the length of program for the BTEC higher national diploma received in 1997 was two years. The evaluator then finds the beneficiary's studies to be the equivalent of a baccalaureate degree from an accredited U.S. educational institution. There is no further information in the record as to the length of the diploma program that ended in 1995. Furthermore the record is devoid of any information as to the coursework the beneficiary took to obtain the two diplomas, and whether the BTEC diplomas are evidence of vocational or university-level studies. Without more persuasive evidence, the educational evaluation document does not provide sufficient detail to establish the equivalency of the beneficiary's studies to a baccalaureate degree from an accredited U.S. institution.

Counsel, in a three-page memo submitted with the original petition, provided an analysis of how the beneficiary's studies related to the duties of the proffered position. However, as previously stated, the record is devoid of any documentary evidence concerning the coursework that the beneficiary undertook at Blackpool and The Fylde College for either diploma program. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence, the petitioner has not established that the beneficiary is qualified to perform the duties of the proffered position.

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 sustained that burden with regard to whether the proffered position is a specialty occupation. However, the record remains incomplete with regard to whether the beneficiary is qualified to perform the duties of the proffered position. Accordingly, the decision of the director will be withdrawn and the matter remanded to the director for further consideration with regard to the beneficiary's qualifications. The director may request any additional evidence deemed necessary to assist him with his determination.

ORDER: The director's decision is withdrawn. The matter is

remanded to the director for further consideration of the beneficiary's qualifications and entry of a new decision, which if adverse to the petitioner, is to be certified to the AAO for review.