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Citizenship and Immigration Services

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

FILE: SRC 02 203 50248

OFFICE: TEXAS SERVICE CENTER

DATE: **JAN 20 2004**

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:

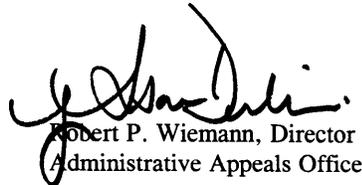
INSTRUCTIONS:

This is the decision 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant that, according to the petitioner, currently employs "2 (two) 15-18 (Est)" persons and has an estimated gross annual income of \$624,000. It seeks to employ the beneficiary as a food production manager for a period of three years. The director denied the petition for failing to establish that the proffered position was a specialty occupation.

Although counsel submitted a Form I-290B, Notice of Appeal, on September 6, 2002, which indicated that a brief and/or evidence would follow within 30 days, the record contains no brief or evidence additional to what was in the record prior to the director's denial of the petition. As counsel has had sufficient time to submit matters on appeal, the AAO will proceed on the record as presently constituted.

The Form I-129 listed the proffered position as "Food Production Manager."

Among the documents that counsel submitted with the Form I-129 was a letter of support from the petitioner's president. According to the letter, the petitioner "presents the mild spicy taste of original Pakastani/Indian food in a quality restaurant." The president's letter also states that the petitioner concentrates in three areas: (1) restaurant dining, with a seating capacity of 150 for lunch and dinner; (2) hosting banquets, wedding receptions, and social gatherings at its banquet hall facility; and (3) outdoors catering, the petitioner's "strong focal point." The president's letter also described the duties proposed for the beneficiary:

We have asked [the beneficiary] to assist us in meeting the demands and challenges that will be created by our success. [He] will take the position of Food Production Manager and his job duties will include coordinating activities of and directing indoctrination and training of Chefs and other kitchen workers engaged in preparing and cooking ethnic foods in our restaurants, planning menus and taking into account {the} probable number of guests, marketing conditions, and popularity of various dishes, estimating food consumption in order to limit surplus, analyzing ingredients, labor, and overhead costs to determine menu prices, directing food apportionment policy to control costs and supervising food production to ensure quality, taste, and freshness. [The beneficiary] will report directly to me, President of the Corporation. The above duties are specialized to such a degree that

we believe they can only be performed by an individual who holds at least an equivalent of a U.S. Bachelor's degree. In our opinion, a Bachelor's Degree is the normal educational prerequisites [sic] in our industry for a position of this caliber.

Also among the documents submitted with the Form I-129 was a letter to the beneficiary which confirmed the offer of the proffered position to him with the same duties as described in the president's letter.

Subsequent to the filing of the Form I-129, the director issued a request for additional evidence, which notified the petitioner that the director found that the Form I-129 and its associated documents failed to establish that the proffered position was a specialty occupation. Counsel replied with a cover letter that enclosed another letter from the petitioner's president, and letters from two other restaurants regarding their hiring practices for Food Service Manager and Food Supervisor positions.

The president's letter restated the proposed duties and stated that they "will require the person to have a good knowledge of English, Accounting, Finance, Cost Valuation principals and general managerial skills." The letter also asserts, in part, "We feel that that a person having at least a bachelor's degree in Business Administration or its equivalent is well qualified, in that, he or she has the requisite knowledge, training, and skills to perform the above mentioned tasks."

In denying the petition for lack of sufficient evidence to establish that the proffered food service manager position was a specialty occupation, the director presented a quotation from an unspecified edition of the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, to the effect that many food service manager positions are filled by promoting experienced workers, and that most food service management companies and national or regional chains also recruit their management trainees from two and four-year hospitality management programs. The director also noted that the evidence of record did not establish an industry standard of requiring bachelor's degrees.

On the Form I-290, counsel states,

We believe that it is the industry standard that a position of this nature requires a person with a Bachelors Degree. We had submitted evidence of restaurants which hire in this position and who require a Bachelors Degree. In addition, the additional evidence will include evidence from [the] Hotel/Restaurant school from an accredited University that offer [sic] Degrees in this field. Also

additional evidence will be provided to show prospective employers seek these individuals.

Section 214(i)(1) of the Immigration and Nationality 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 is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

It is worth emphasizing that "degree" as used in each of the four criteria at 8 C.F.R. § 241.2(h)(4)(iii)(A) means one in a "specific specialty," that is, in a discipline associated with a body of highly specialized knowledge that is necessary for performance of the proffered position. See section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(iii)(A). See also *Tapis International v. INS*, 94 F. Supp. 2d 172, 175 (D. Mass. 2000).

As the following discussion will show, the evidence does not satisfy any of the H-1B specialty occupation criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

**I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.
-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1) .**

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

The petitioner's conclusions about educational requirements are persuasive only to the extent that they reflect evidence in the record. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Here, the evidence of record does not support the contention that the proffered position is one that normally requires a bachelor's degree or higher, or the equivalent, in a specific specialty.

The AAO routinely consults the *Handbook* for its authoritative information about particular occupations' duties and educational requirements. Here the AAO consulted the Restaurant and Food Services Managers section, at pages 76-79 of the 2002-2003 edition.

The proffered position substantially comports with the duties and responsibilities that the *Handbook* describes for the food service manager occupation, and the *Handbook* indicates that this occupation does not require a bachelor's degree or higher, or the equivalent, in any specific specialty. According to the *Handbook*, many experienced food and beverage preparation and service workers are promoted to fill food service manager positions. Also, according to the *Handbook*, applicants with either a bachelor's or an associate's degree in restaurant and institutional food service management should have the best job opportunities.

The evidence of record does not rebut the *Handbook's* information about the lack of a requirement for a specialty degree or its equivalent.

As the evidence does not establish the proffered position as one that normally requires a bachelor's degree or higher, or the equivalent, in a specific specialty, the petitioner has not met the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position 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).

A. Degree requirement common to the industry.

Factors often considered by 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)).

The two letters from other restaurants are not compelling. They provide too small a sample to establish an industry-wide standard. It also should be noted that one of the restaurants requires just a bachelor's degree without specifying a particular major field of study.

Additionally, as discussed above, the *Handbook* indicates that the proffered position is not one with an industry-wide requirement for a degree in a specific specialty.

Counsel's asserted opinion as to the industry-wide hiring standard has no evidentiary value. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

B. Degree necessitated by the complexity or uniqueness of the position.

The record fails to establish that the proffered position is more complex or unique than what should be expected from food service manager positions in general, and, as indicated in the discussion at section I above, these do not usually require a bachelor's degree in any specific specialty.

The director was correct in not granting the petition under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (3).

The president's second letter stated, in part:

In addition, in our restaurants in Riyadh, Saudi Arabia, and Jiddah, Saudi Arabia, we have always hired personal [sic] in this position, that had managerial education and/or its equivalent. We feel that this position requires the applicant to be well versed in the management field in order to oversee the costs of the food valuation, manage the other chefs in our restaurant, and supervise the purchasing of food supplies.

This assertion is too ambiguous to convey exactly what degrees or equivalent the petitioner has required in the past. Furthermore, even if the petitioner had established that it had always hired people with a bachelor's degree or higher in a specific specialty, the evidence would have to show that the particular position's actual duties required such credentials. The evidence of record does not do that.

The director was also correct in not granting the petition under 8 C.F.R. § 214.2(h) (4) (iii) (A) (3).

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 214.2 (h) (4) (iii) (A) (4).

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a bachelor's degree or higher in a specific specialty. Rather, the duties appear no more specialized or complex than those that the *Handbook* describes for the food service manager occupation in general, an occupation which, the *Handbook* indicates, is not usually associated with a baccalaureate or higher degree in a specific specialty.

Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h) (4) (iii) (A) (4).

As related in the discussions above, the petitioner has failed to establish any one of the four specialty occupation criteria of 8 C.F.R. § 214.2 (h) (4) (iii) (A). Accordingly, the AAO shall not disturb the director's denial of the petition.

Again, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361, *supra*. The petitioner has not sustained that burden.

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