

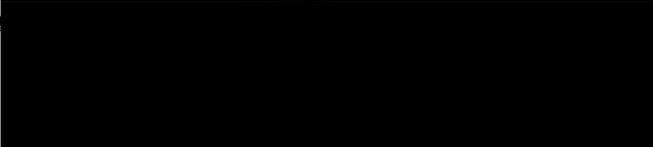
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**U.S. Citizenship
and Immigration
Services**

DA



FILE: EAC 03 075 53517 Office: VERMONT SERVICE CENTER

Date: **JUN 24 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 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.

Mari Johnson

to 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 wholesale specialty bakery that seeks to employ the beneficiary as a lead production supervisor – breads. 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 is not a specialty occupation. On appeal, counsel submits a brief.

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.

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 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) 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) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a lead production supervisor – breads. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's December 26, 2002 letter in support of the

petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: overseeing the preparation and execution of the petitioner's proprietary bread formulas for its entire bread product line; managing each stage of the petitioner's production from mixing and make-up through proofing, baking, and freezing; monitoring production equipment performance and maintenance; enforcing all internal quality and external regulatory standards of sanitation and safety; creating a weekly production schedule based on information provided by the Director of Bakery Production; managing all daily bread production according to schedule and budget; hiring, training, evaluating, and terminating bread production staff; participating in weekly plant management meetings; participating in the "HACCP program"; and serving as a resource to pastry production, product development, sales, and marketing. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in baking and pastry arts or an equivalent thereof.

The director found that the proffered position was not a specialty occupation because the petitioner had not demonstrated that a baccalaureate degree in a specific specialty is required. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proffered position is a specialty occupation because it satisfies all four criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A). Counsel states that the petitioner's "Lead Production Supervisor – Pastry," a position that is equivalent to the position offered to the beneficiary except it deals with pastry rather than bread, has been found to be an H-1B specialty occupation. Counsel further states that the beneficiary's supervisor, whose title is "Director of Bakery Production," has also been found to be an H-1B specialty occupation. Counsel provides evaluations to demonstrate that the individuals filling these two positions both hold the equivalent of a bachelor's degree in a related specialty. Counsel states that the petitioner's Director of Frozen Business Development and Custom Production, who was granted L-1 status, possesses the same educational background and comparable experience to the beneficiary, and the petitioner's Vice President of Production holds a bachelor's level diploma and a master's level diploma in related specialties. Counsel further states that the record contains a professional opinion to further establish that the degree requirement for an industrial production manager position is industry wide, as well as excerpts from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and *Dictionary of Occupational Titles (DOT)*. Finally, counsel states that the proposed duties, which entail holding full responsibility and discretionary authority over the staffing and operations of the bread and pastry production departments, are so complex that a baccalaureate degree in a specific specialty or its equivalent is required.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first 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; 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 often considered by CIS when determining these criteria 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." See *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 AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is that of an industrial production manager. A review of the Industrial Production Managers employment description in the *Handbook*, 2004-2005 edition, finds that almost all industrial production managers are employed in manufacturing industries, including the plastics product manufacturing, printing and related support activities, motor vehicle parts manufacturing, and semiconductor and other electronic component manufacturing industries. Rather, the proffered position appears to be primarily that of a food service manager. No evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, is required for a food services manager job.

Counsel's reference to and assertions about the relevance of information from the *DOT* are not persuasive. The *DOT's* SVP rating does not indicate that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for entry into the occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular position. The classification does not describe how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

The record contains an evaluation from ██████████ Associate Dean, College of Culinary Arts, Johnson & Wales University, who states, in part, that it is very common for employers to require a baccalaureate degree or higher for the position of production manager/supervisor. 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).

The record does not include any evidence regarding parallel positions in the petitioner's industry or from professional associations regarding an industry standard. Nor does the record include any documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) or (2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel states the petitioner's employees who fill the positions of Lead Production Supervisor – Pastry, Director of Baker Production, Director of Frozen Business Development and Custom Production, and Vice President of Production all hold a related baccalaureate degree or an equivalent thereof. Counsel provides evidence that two of these employees have been granted H-1B status. Counsel's assertion that the proffered position is similar to these other managerial positions is noted. The record, however, contains only a "proposed" organizational chart even though information on the petitioner's "Profile of Firm" document indicates that it was established in 2000. As such, the petitioner's actual organizational structure and the actual duties of the petitioner's managerial employees are not clear. In view of the foregoing, the petitioner has not persuasively established that the proffered position is similar to its other managerial positions, or that it normally requires a degree for the proffered position. It is additionally noted that the number of the petitioner's employees is reflected on the petition as 47 in contrast to the information on the "Profile of Firm" document that reflects the number of employees as 35. The record contains no explanation for this inconsistency. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, although counsel asserts that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past, this record of proceeding does not contain all of the supporting evidence submitted to the service center in the prior cases. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the other H-1B petitions were parallel to the proffered position.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, the AAO is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior approval was granted in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding that is now before the AAO, however, the approval of the prior petition would have been erroneous. The AAO is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither the AAO nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Counsel also submits an unpublished AAO decision in support of the appeal. While 8 C.F.R. § 103.3(c) provides that CIS precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Furthermore, the petitioner has not demonstrated that the proffered position is as complex as the position in the unpublished decision, which is that of an executive pastry chef who oversees the activities of three pastry chefs.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(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.

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 baccalaureate or higher degree, or its equivalent, 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 discussion above, 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 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.