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



FILE: EAC 01 219 51256 Office: VERMONT SERVICE CENTER Date: **MAR 15 2004**

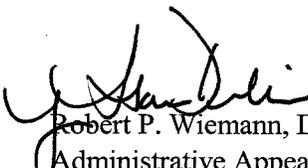
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:
[Redacted]

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 an Indian restaurant. In order to employ the beneficiary as a food service manager, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(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 petitioner failed to establish that the proffered position was a specialty occupation.¹

According to the petitioner, the volume of its business requires it to hire the beneficiary to serve along with the food manager already on its staff. The director's language reflects that he based his decision upon his finding that the evidence of record did not establish that the petitioner actually needed the beneficiary's services as an additional food services manager. Thus, the decision stated, in particular, that the record "fails to establish that a realistic job offer as Food Service Manager exists." On appeal, counsel contends that the documentary evidence establishes that the petitioner does, in fact, require the beneficiary's services as an additional food service manager.

Upon consideration of all the evidence of record, the AAO has determined that the decision to deny the petition was correct. However, the AAO reached this determination on a different basis than the director's decision. The AAO concluded that, regardless of whether there was a *bona fide* need for a second food service manager, the proffered position did not qualify as a specialty occupation.

In reaching its decision, the AAO considered the entire record of the proceeding, including (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the matters counsel submits on appeal, including the Form I-290B, counsel's brief, and the documentary exhibits that counsel submits with the brief.

The AAO concurs with the director's implicit finding that the proffered duties are, indeed, those of a food service manager. However, as discussed below, the AAO finds that this position does not qualify as specialty occupation, even if the petitioner has a *bona fide* need to fill it.

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

¹ Counsel filed on Monday, September 16, 2002, which is 34 days after the director's decision of August 13, 2002. The service center treated the appeal as a motion and dismissed it as not having been filed within 33 days of the director's decision. Actually, the appeal was timely, as it was filed on the first day after a weekend during which the 33-day time for filing expired. See 8 C.F.R. § 1.1 (h).

- (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 important to note that 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.

Counsel's letter of reply to the RFE asserted that the H-1B petition of another person, specifically named by counsel, was approved for a food service manager position at one of the Bombay Peacock Grill Locations. Counsel also submitted documentation to corroborate this fact. That other person's proceeding is not before the AAO, and, accordingly, the AAO shall not now review it to determine whether approval of that person's petition was erroneous. CIS 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).

Despite counsel's contention to the contrary, 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.

First, the proffered position does not qualify as a specialty occupation in accordance with the criterion at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1), because a food service manager's position is not a type that normally

requires a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum entry credential.

Next, the AAO determined that the evidence of record does not qualify the proffered position as a specialty occupation under either of the two prongs of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

With regard to the first prong, the evidence of record did not establish that the proffered position has a degree requirement that is common to the industry in parallel positions among organizations similar to the petitioner.

Factors often considered by CIS when determining this criterion 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)). Because it does not report an industry-wide requirement for a degree in a specific specialty, the *Handbook* does not support the proffered position on this issue. Furthermore, there are no attestations about a specialty degree requirement from an industry association or any firms or individuals participating in the petitioner's industry. Also, the petitioner provided no other evidence to establish that there is an industry-wide degree requirement.

Next, the evidence of record does not qualify the proffered position under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2). As described in the record, the food service manager position at issue here is not so complex or unique as to require a degree in a specific specialty. On the basis of the record, it appears that the proffered position is no more unique or complex than food service manager positions in general, and the *Handbook* indicates that they do not usually require a baccalaureate or higher degree in any specific specialty.

Accordingly, the petitioner did not meet either of the two prongs set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO turned next to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)--a position for which the employer normally requires a specialty degree or its equivalent. In this regard, it should be noted that the designation of a degree requirement must be rooted in performance necessities, rather than other considerations of the employer.

The AAO considered counsel's assertion that all five locations in the petitioner's restaurant chain require "a bachelor's degree or its equivalent in the hospitality field," and that the petitioner "has consistently maintained this degree requirement as a standard for its Food Service Managers." The record does not clarify what counsel means by "consistently maintained," and there is no hiring history documentation in the record to support counsel's assertion. This is despite the RFE's explicit request for documentation. Furthermore, 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).

Finally, the AAO applied the criterion 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 such highly specialized knowledge. Rather, the duties appear to comport with those generally

associated with a food service manager, an occupation that the *Handbook* indicates does not usually require a bachelor's degree or higher in any 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.