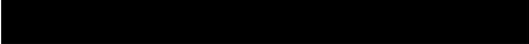




U.S. Citizenship
and Immigration
Services

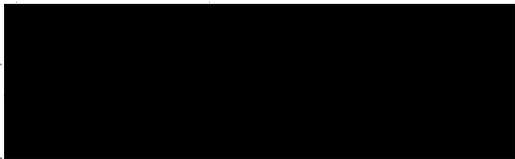


FILE: LIN 03 183 53616 Office: NEBRASKA SERVICE CENTER Date: **OCT 27 2004**

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.

Robert P. Wiemann, Director
Administrative Appeals Office

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

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DISCUSSION: The director of the 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 is an upscale restaurant/bar. In order to employ the petitioner as a general manager, 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 on the basis that the petitioner had failed to establish that the proffered position is a specialty occupation. On appeal, counsel contends that the evidence of record demonstrates that the director's decision was erroneous and that the petition should therefore be granted.

The AAO has determined that the director's decision to deny the petition was correct. The AAO based its decision upon its consideration of the totality of the evidence contained in the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B (with its annotations by counsel) and counsel's brief.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [1] 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 [2] 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." (Italics added.)

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) has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

Despite this statutory, regulatory, and CIS adjudicatory framework, the evidence of record does not indicate that performance of the duties of the proffered position requires at least a bachelor's degree, or its equivalent, in a specific specialty. The evidence does not substantiate counsel's assertion that the petitioner's general manager must have "a bachelor's degree with a concentration in either economics or accounting." 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). Furthermore, the assertions of counsel do not constitute evidence. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The letters submitted from three other food service establishments opine only that a bachelor's degree is required, and they do not specify any particular major or course concentration. The two job vacancy advertisements in the record do not state a requirement for a bachelor's degree in any specific specialty: one merely cites a "[C]ollege degree in business or a closely related field" as a substitute for "a portion of the required experience"; the relevant part of the other advertisement only states, "If you have a college degree and/or prior restaurant experience, you may qualify." Also, the record's descriptions of the proposed duties are too generic and generalized to indicate that their performance would require the possession and application of a bachelor's degree level of knowledge in accounting, economics, or any other specific specialty. Counsel's letter of reply to the RFE is typical of the abstract level at which the proposed duties are described throughout the record, as it conveys these duties in such generalized terms as "[e]stablishing standards for personnel administration and performance, service to patrons, advertising, publicity, credit, food selection, service and type of patronage to be solicited"; "present[ing] information concerning such factors as economic trends, operational capabilities and possible

development or introduction of new products for consideration”; and “planning the dining room bar and banquet operations by allocating funds, authorizing expenditures, and assisting in planning budgets.” In a proceeding where the petitioner shoulders the burden of proof, section 291 of the Act, 8 U.S.C. § 1361, the petitioner has failed to convey the extent to which performance of specific duties at the restaurant and bar would involve the practical and theoretical application of highly specialized knowledge. Consequently, the AAO finds that, as depicted in the record, the proffered general manager position does not fit the specialty occupation definitions of section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii).

The AAO also finds that the evidence of record does not satisfy any of the more particularized criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence is not sufficient to align the proffered position with any occupation for which the *Handbook* recognizes a requirement for at least a bachelor’s degree in a specific specialty, and the evidence does not otherwise indicate that a baccalaureate or higher degree, or its equivalent, in a specific specialty is normally the minimum requirement for entry into the particular position. Thus, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) has not been satisfied.

Also, the petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor’s degree in a specific specialty that is common to the petitioner’s industry in positions which are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner. As discussed earlier, the few letters of support that the petitioner has presented from other food service establishments do not assert that the college degrees they require must be in a specific specialty. As also indicated earlier, the job vacancy advertisements submitted by the petitioner are not indicative of an industry requirement for college degrees in a specific specialty. Furthermore, these advertisements are too few to establish an industry-wide standard.

The AAO also finds that the evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), which provides that “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.” Likewise, the AAO finds that the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The evidence does not substantiate counsel’s view that that the proposed duties are so complex and specialized as to qualify the proffered position as a specialty occupation. As indicated earlier, counsel and the petitioner have relied on general and abstract descriptions of the proposed duties, but such information does not convey that the proffered position or the performance of its associated duties are so complex, specialized, or unique that they cannot be routinely performed by a general manager. The *Handbook* does not indicate that such a position requires highly specialized knowledge as a minimum requirement for entry into the occupation.

Finally, the petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty. As the record

demonstrates that this is the first time that the proffered position is being offered, this criterion is not a factor: as counsel indicates, the petitioner has not yet had the opportunity to establish a relevant history of recruiting and hiring. The AAO notes counsel's concern about the director's reference to the fact that the petitioner had not satisfied this criterion. However, the director's reference was supported by the record, and his decision indicates that the director did not accord undue weight to the petitioner's not meeting this criterion, but properly counted the criterion as just one of several alternative ways for qualifying a position as a specialty occupation.

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.