



U.S. Citizenship
and Immigration
Services

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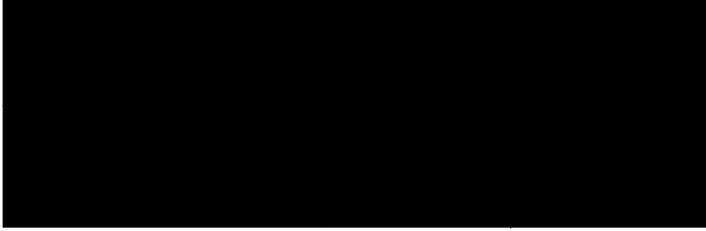


FILE: SRC 01 091 53083 Office: TEXAS SERVICE CENTER Date: **SEP 02 2004**

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

Gr Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy

DISCUSSION: The Director of the Texas Service Center denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on motion to reopen or reconsider. The motion will be dismissed.

The petitioner is a restaurant that seeks to employ the beneficiary as a food service manager. The director denied the petition on the basis that the proffered position did not meet the definition of a specialty occupation.

On motion, counsel states that the AAO misinterpreted and incorrectly applied the law, and failed to consider the evidence of record. According to counsel, the AAO erroneously stated that because *some* food managers do not hold a bachelor's degree, employers do not *normally* require a bachelor's degree. Counsel contends that according to the *Merriam-Webster Dictionary*, there is a distinction between the term "normal," which is defined as conformity with the standard, and "some" which is an unknown or undefined amount. Counsel asserts that the industry standard requires a food service manager to possess either a degree *or its equivalent*. According to counsel, employers may accept an associate's degree; however, a bachelor's degree is common in the industry and employers do not usually hire lesser-qualified candidates. Counsel claims that the job's complex nature is demonstrated by the evidence about master's degree programs, which was not considered by the AAO, and the years of experience to be a qualified food service manager. Counsel mentions that many accredited United States and foreign institutions award degrees in the field. According to counsel, the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* lists a food manager as a professional, technical, and managerial occupation and gives it a certain SVP rating. Counsel contends that Citizenship and Immigration Services (CIS) had previously approved an H-1B petition filed for the beneficiary for a food service manager job; counsel alleges that the only difference with the instant petition and the prior case is the physical location of employment. Another of counsel's claims is that the AAO misinterpreted and misapplied the law, and counsel refers to three cases to support this claim: *Full Gospel Portland Church vs. Thornburgh*, 730 F. Supp. 441 (D.D.C. 1988), *Hong Kong T.V. Video vs. Ilchet*, 685 F. Supp. 712 (N.D. Cal. 1988), and *Globenet, Inc. vs. Attorney General*, 1989 WL 132041 (D.D.C. Jan. 10, 1989). Counsel also contends that the AAO did not properly consider the newspaper business article about managerial jobs in the industry. Last, counsel submits tax records, information about the petitioner, and Internet pages from *Webster's New World Dictionary*.

Counsel's submission of additional evidence does not satisfy either the requirements of a motion to reopen or a motion to reconsider. A motion to reopen must state the new facts that will be proven if the matter is reopened, and must be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Generally, the new facts must have been previously unavailable and could not have been discovered earlier in the proceedings. 8 C.F.R. § 1003.23(b)(3). Here, the evidence of tax records, bank statements, and Internet postings from the *Merriam-Webster Dictionary*, and information about the petitioner was previously available to the petitioner and could very easily have been submitted earlier in the proceedings. The financial information was part of the petitioner's business records, and Internet postings are readily accessible to the general public. Accordingly, the evidence contained in this motion is not "new" for the purpose of a motion to reopen.

A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). Here, counsel states that the AAO's decision to deny the petition was based on a misinterpretation and incorrect application of the law, and failure to consider the evidence of record. Counsel cites to court decisions and specific evidence in the record to support his statement. However, counsel's assertions and the submitted evidence do not prevail in satisfying the requirements of a motion to reconsider. The tax records and bank statements are not on point; they have no probative value in establishing that the AAO misinterpreted and incorrectly applied the law or failed to consider the evidence of record. With respect to the Internet pages from the dictionary, they do not establish that the AAO misinterpreted the law or applied it incorrectly. On motion, counsel states:

[T]he AAO reasons that because "some" food managers do not obtain their positions through [sic] obtaining a degree, the requirement is therefore not "normally" required.

However, the following quoted passage from the AAO's decision shows that it is counsel who misinterprets the AAO's statements. The AAO stated:

The Handbook states that some food service managers obtain their positions through in-house promotion; others have two or four-year degrees from college hospitality management programs, while still others are graduates with degrees in other fields who have demonstrated aptitude. Accordingly, the evidence does not support a finding that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position.

Certainly, the quoted passage correctly concluded that the *Handbook* shows that there are many avenues to become a food service manager, most of which do not require a baccalaureate degree in a specific specialty. Consequently, the AAO did not misinterpret or apply the law incorrectly.

There is no evidence in the record to support counsel's assertions about the industry standard. The AAO had considered the submitted newspaper article when it stated that the director noted that the article did not mention the level of education required to perform the job of a restaurant manager.

Counsel claims that the evidence in the record showing that master's degrees are available in the field was not considered by the AAO. The AAO's decision had stated that the director pointed out that educational institutions offered various degrees, ranging from two-year to master's degrees in the field of hotel and restaurant management. Furthermore, the AAO had stated "a review of the entire record does not support a finding that the proffered position qualifies as a specialty occupation." Consequently, the AAO's statement would have encompassed the information about educational institutions.

Counsel contends that CIS had previously approved an H-1B petition filed for the beneficiary for a food service manager job; counsel alleges that the only difference with the instant petition and the prior case is the physical location of employment.

The record shows that the beneficiary had an approved H-1B petition with another company; nevertheless, this record of proceeding does not contain all of the supporting evidence submitted to the Texas Service Center in the prior case. 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, CIS 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 other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or 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). It would be absurd to suggest that CIS or any 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's reference to *Full Gospel Portland Church*, *Hong Kong T.V. Video*, and *Globenet Inc.* does not establish that the AAO's decision was based on an incorrect application of law or CIS policy. In *Full Gospel Portland Church*, a 1988 case, the court did use the Fair Labor Standards Act to as a means of defining a "professional" position. However, to determine whether a given position qualifies as a specialty occupation, CIS now applies certain criteria, which it codified in its 1990 regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), and following the 1990 Act, slightly modified to read as follows:

- (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.

Consequently, whether a given position is considered a specialty occupation by CIS is based on 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), and

the regulations set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO did not misinterpret or misapply the law.

Counsel cites the cases of *Globenet, Inc. and Hong Kong T.V. Video*, though he never explains how they support his statement that the AAO misinterpreted the law or applied it incorrectly. Counsel merely claims that the court in *Hong Kong T.V. Video* stated that Congress intended to permit a broad spectrum of occupations or positions with varying educational requirements to be treated as professions, and that a position could be a profession based on the complexity of its duties. Referring to *Globenet, Inc.*, counsel simply states that the court determined that an employer's prior employment of degreed persons in a position may be considered, although it is not helpful with a new company. The AAO notes that *Globenet, Inc.* resulted in an unpublished decision that did not have any precedential value, procedural or otherwise.

Finally, counsel's reference to the *DOT* is not supported by any pertinent precedent decisions.

A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The motion is dismissed. The previous decision of the AAO, dated June 25, 2003, is affirmed. The petition is denied.