



U.S. Citizenship
and Immigration
Services

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FILE: EAC 03 065 54209 Office: VERMONT SERVICE CENTER Date: SEP 5 2016

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.

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Robert P. Wiemann, Director
Administrative Appeals Office

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prevent clearly unwarranted
invasion of personal privacy**

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 a restaurant that seeks to employ the beneficiary as a food services manager. The petitioner, therefore, 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 neither the proffered position nor the beneficiary qualifies for classification under Section 101(a)(15)(H)(i)(b) of the Act. On appeal, counsel submits a brief and supporting documents.

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 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree but one 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; (5) a labor condition application certified prior to the filing of the Form I-290B; and

(6) Form I-290B and supporting documentation, including an evaluation of the beneficiary's academic credentials and work experience. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a food services or restaurant manager. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would be in charge of all operations, and she will perform duties that entail, in part: hiring, firing, and supervising employees; contacting suppliers and ordering supplies; promoting the restaurant; designing the layout of the restaurant and its equipment; estimating food and beverage costs and requisitions; conferring with food preparation and other personnel to plan menus and related activities; investigating and resolving food quality and service complaints; and handling all financial matters. The petitioner stated that the beneficiary is qualified for the position because her academic training and experience are the equivalent of a bachelor's degree in food services management from an accredited U.S. college or university.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found the *Handbook* reports that a bachelor's degree in a specific specialty is not required for this position.

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), any one of which is essential to classifying the proffered position as a specialty occupation.

As previously mentioned, 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. A petitioner must establish that the position realistically requires knowledge, both theoretical and applied, which is almost exclusively obtained through studies at an institution of higher learning. The depth of knowledge and length of studies required are best typified by a degree granted by such an institution at the baccalaureate level. It must be demonstrated that the position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration, without further specification, does not establish eligibility. The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility. *Matter of Michael Hertz Assoc.* 19 I&N Dec. 558, 560 (BIA 1988).

Under 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2), the AAO must determine whether the position would normally require a baccalaureate or higher degree or its equivalent; whether such a degree is a normal requirement for entry into the particular position; whether a degree requirement is common to the industry in parallel positions among similar organizations; or whether 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

When determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

The AAO routinely consults the *Handbook* in determining whether a position requires a baccalaureate or higher degree or its equivalent for entry into the occupation. A review of the *Handbook* discloses that the director correctly determined that the beneficiary's duties parallel those performed by food service managers. For example, the *Handbook* explains that food service managers recruit, interview, hire, and fire employees; select successful menu items; estimate food consumption, place orders with supplies, and schedule the delivery of fresh food and beverages, each on a daily basis; arrange for equipment maintenance and repair; coordinate services such as waste removal and pest control; oversee employee training; schedule the work hours of employees; and supervise the kitchen and dining rooms, such as overseeing food preparation and cooking, and investigating and resolving customers' complaints about food quality or service. In addition, the *Handbook* reports that, in small establishments, food service managers keep records of the hours and wages of employees, prepare the payroll, and fill out all paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws.

With respect to the qualifications, training, and advancement of food service managers, the DOL states that food and restaurant chains prefer to hire people with degrees in restaurant and institutional food management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurants fill their food service manager positions, the *Handbook* explains, by promoting experienced food and beverage preparation and service workers. The *Handbook* also mentions that most restaurant chains and food service management companies have rigorous training programs for management positions. Thus, according to the *Handbook*, candidates for the offered position would not be required to possess a bachelor's degree in a specific specialty. Accordingly, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - counsel refers to the opinion letters from four other restaurant executives. These letters indicate that the local custom in the industry requires a bachelor's degree in food service management or a related field. None of the letter authors establish the writers' own expertise that would enable them to give opinions on the industry standard for job requirements. Instead, the letters reveal varying levels of experience in managing their individual restaurants. Nor do the writers bolster the letters with corroborating evidence such as surveys, industry data or educational background to establish a broad-based expertise. Further, none of the letters reveals whether each of their restaurants is similar in size, hours of operation, menu selection, number of employees, gross and net income levels, restaurant quality, etc., to that

of the petitioner's, all of which weakens any claim that petitioner operates under the same industry standards as their restaurants do. Thus, the AAO cannot determine whether the positions in each case are parallel.

Counsel has also submitted a sampling of New York classified job ads for food service manager positions. While some ask only for applicants with a bachelor's degree, other ads do not.

No evidence is in the record that would show the proffered position is so complex or unique that only an individual with a bachelor's degree can perform it. Counsel does assert that the position requires a "high caliber food manager to stay competitive" in Connecticut. Counsel states that the Westport, Connecticut area is becoming an area of "high-end mansions, residences of the well established professionals... and it has become the vacationing, luxury resorts region of the U.S.," as if to suggest this makes it mandatory that only someone with a "specialty occupation" can fill the position. However, counsel does not demonstrate how the demographics of the petitioner's customer base in any way changes the particular duties of the position. The evidence, thus, is insufficient to establish the second criterion.

Although the petitioner claims that it normally requires a degree or its equivalent for the position, there is no evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Moreover, the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum requirement for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. Thus, if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. According to counsel, the duties of the proffered position are complex, requiring a bachelor's degree in business administration. Again, as already discussed above, the duties have not been shown to be so complex that they cannot routinely be performed by a food service manager without the theoretical and practical application of a body of highly specialized knowledge.

Counsel further asserts that the proffered position is a specialty occupation by virtue of the complexity of its managerial duties beyond those specified for food services managers in the *Occupational Outlook Handbook*.

To this end counsel cites an AAO decision, WAC-02-136-52595, in which the AAO sustained an appeal for a petition to classify a position for a French pastry chef and manager at a restaurant of "national renown," which the office sustained because of the chef's extra duties raising the position's complexity above "the

relatively simple duties of a food service manager position as listed in the *Handbook*.” Here the director correctly contrasts the proffered position to that in the cited case involving the French pastry chef. Counsel has suggested that, like the French pastry chef’s duties, those of the Bombay Bar and Grill go well beyond those for an ordinary food services manager. Among the duties listed by counsel for the proffered position are those of managing restaurant personnel, directing restaurant operations, overseeing day-to-day inspections and quality control, meeting with company executives, performing frequent analysis of restaurant operations, and resolving complaints over food quality. However, that listing differs little from the catalogue of duties of a food services manager in the *Handbook*. Significantly, the *Handbook*’s list of job qualifications for a food services manager do not include a bachelor’s degree as a minimum. Instead, it states that such a degree, while desirable, is not required. As related in the discussion above, the petitioner has thus failed to establish that the proffered position is a specialty occupation.

The director also found that the beneficiary would not be qualified to perform the duties of the proffered position if the job had been determined to be a specialty occupation. The AAO is dismissing the appeal because the job is not a specialty occupation. Nonetheless, this decision will examine the issue of the beneficiary’s qualifications for a specialty occupation position.

The path of the beneficiary’s education and her work experience stray far from the petitioner’s desired destination of food services manager at the petitioner’s place of work. The beneficiary submits a copy of a diploma from the University of Delhi, awarding a three-year bachelor’s degree in commerce, and a copy of a two-year graduate diploma course in management from the Indian Institute of Planning and Management. Her six-plus years of work experience indicates she worked for three years as head of kitchen operations at a hotel in Mussoorie, India; her other prior work consisted of jobs in the diverse fields of public relations, stage production and marketing research.

Section 214(i)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation, and completion of the degree in the specialty that the occupation requires. If the alien does not possess the required degree, the petitioner must demonstrate that the alien has experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, an alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

The petitioner is seeking the beneficiary's services as a restaurant food service manager. In a June 26, 2003 letter, one of the petitioner's executives states that to qualify for the proffered position the beneficiary must hold, as "the industry standard minimum" a bachelor's degree or its equivalent in food service or culinary arts.

On appeal, counsel states that the beneficiary is qualified for the position because she has completed a three-year degree program from an Indian institution plus a two-and-a-half-year marketing management program besides the six-plus years of relevant work experience.

Upon review of the record, the petitioner has failed to establish that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in food services or culinary arts. The beneficiary does not hold a baccalaureate degree from an accredited U.S. college or university in any field of study, or a foreign degree determined to be equivalent to a baccalaureate degree from a U.S. college or university in any field of study. Therefore, the petitioner must demonstrate that the beneficiary meets the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), equating the beneficiary's credentials to a United States baccalaureate or higher degree shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

On appeal, counsel submits a June 23, 2003 evaluation from the Indo-U.S. Technology & Educational Services, Inc., a company that specializes in evaluating academic credentials. The evaluator concluded that the beneficiary possesses the equivalent of a bachelor's degree in food services management from an accredited U.S. college or university. However, the evaluation is based upon the beneficiary's education, training and work experience. A credentials evaluation service may not evaluate an alien's work experience or training; it can only evaluate educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). Thus, the evaluation carries no weight in these proceedings. *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

When CIS determines an alien's qualifications pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation¹;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements that a recognized authority has determined to be significant contributions to the field of the specialty occupation.

¹ *Recognized authority* means a person or organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. A recognized authority's opinion must state: (1) the writer's qualifications as an expert; (2) the writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom; (3) how the conclusions were reached; and (4) the basis for the conclusions supported by copies or citations of any research material used. 8 C.F.R. §214.2(h)(4)(ii).

The director found that the beneficiary's three-year foreign degree in commerce and her two-year, post-graduate marketing management program were "unrelated" to the degree requirement of food services or culinary arts. He instead equated the beneficiary's education to two years of university-level credit. In his decision the director, using a three-for-one formula equating three years "of progressively responsible professional work experience" to one year of university course credit, calculated that the beneficiary's credentials did not amount to a four-year degree. While the evaluator concludes that education and practical experience add up to the equivalent of a four-year degree, the AAO cannot accept the conclusions based upon an evaluation of work experience, as noted above. The AAO will accept the evaluator's conclusion that the beneficiary has three years of university-level education in commerce, a field unrelated to that required by the petitioner.

As noted above, counsel has submitted an evaluation of academic credentials and work experience regarding the beneficiary's two foreign academic degrees and "six years of progressively responsible work experience in [sic] food services and events management industry." The evaluator concludes that beneficiary's education is the equivalent of a bachelor's degree from a U.S. college or university in the field of food services management. While the petitioner's evaluator asserts his authority to grant college-level credit for training or experience in the computer information systems department of a United States college, the record contains no independent evidence of his authority, nor does it establish the evaluator as a recognized authority in the specialty of food services management education and experience. See *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988). Besides the evaluator's conclusions that the beneficiary's work experiences were related to the desired food services degree, the petitioner did not submit any independent evidence showing this to be true. Simply going on record is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the petitioner has failed to establish the beneficiary's qualifications under 8 CFR § 214.2(h)(4)(iii)(D)(I).

The AAO now turns to the beneficiary's prior work experience to examine if it included the theoretical and practical application of specialized knowledge required by the specialty. As described by each employer, the beneficiary's duties did not appear to involve the theoretical and practical application of food services management. The evidence included letters from the beneficiary's previous places of employment, not all of them connected with the food services industry. One employer described her earlier work experience as involving the "production and installation of signages [sic] for corporate houses." Another described her training "on the execution of stage and sets for live concerts, films, events, exhibitions and television serials." Elsewhere she helped with media relations. For nearly three years she headed kitchen operations for an Indian hotel, most of this occurring before she had received her three-year college degrees in India in 1995. The letters describe the beneficiary's duties generically; not specific to the beneficiary's daily activities or her level of responsibility. Thus, the AAO cannot conclude that the beneficiary's past work experience included the theoretical and practical application of a body of highly specialized knowledge. Furthermore, none of the employers indicates that the beneficiary's work experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in a specialty.

Finally, there is insufficient evidence that the beneficiary's evaluator is recognized as an expert. The AAO notes that the evaluator from Indo-US technology cannot be considered a "recognized authority" because the evaluator, while providing an abbreviated resume, attached none of his own diplomas or other evidence to the

evaluation. The petitioner has not shown that the beneficiary has recognition of expertise. The petitioner has not established the beneficiary's degree equivalency under 8 CFR § 214.2(h)(4)(iii)(C)(5).

As related in the discussion above, the petitioner has failed to establish that the beneficiary is qualified to perform the duties of the proffered position. 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.