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U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529

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U.S. Citizenship
and Immigration
Services

D2



FILE: [REDACTED] Office: TEXAS SERVICE CENTER Date: APR 05 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

C: [REDACTED]

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

In order to properly file an appeal, the regulation at 8 C.F.R. § 103.3(a)(2)(i) provides that an affected party must file the complete appeal within 30 days after service of the unfavorable decision. If the decision was mailed, the appeal must be filed within 33 days. *See* 8 C.F.R. § 103.5a(b).

The record indicates that the director issued the decision on June 20, 2002, and included notice of the 33 days that CIS regulations allow for filing the appeal. The record reflects that the appeal was initially rejected for failure to include the required filing fee, and that CIS did not receive the appeal with the required fee until August 1, 2002, or 42 days after the decision was issued.

The regulation at 8 C.F.R. § 103.3(a)(2)(v)(B)(2) states that, if an untimely appeal meets the requirements of a motion to reopen or a motion to reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. The official having jurisdiction over a motion is the official who made the last decision in the proceeding, in this case the service center director. *See* 8 C.F.R. § 103.5(a)(1)(ii). The director declined to treat the late appeal as a motion and forwarded the matter to the AAO. Accordingly, the appeal must be rejected as untimely filed.

Additionally, the appeal was filed by an attorney representing the beneficiary alone. Only the beneficiary signed the client authorization section of the Form G-28 (Entry of Appearance as Attorney or Representative) that was submitted in conjunction with the appeal, and the attorney identified in the G-28 signed the Form I-290B (Notice of Appeal) only as counsel for the beneficiary. Citizenship and Immigration Services (CIS) regulations specifically state that a beneficiary of a visa petition is not recognized as an affected party in a proceeding. 8 C.F.R. § 103.2(a)(3). As the beneficiary is not an affected party, her attorney is not authorized to file an appeal. 8 C.F.R. § 103.3(a)(1)(iii)(B). Accordingly, the AAO will reject the appeal pursuant to 8 C.F.R. § 103.3(a)(2)(v)(A)(1).

The appeal must be rejected on each of the grounds discussed above, namely: submission by a person who is not authorized to file an appeal, and lateness.

ORDER: The appeal is rejected.

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Robert P. Wiemann, Director
Administrative Appeals Office

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 full service restaurant that seeks to employ the beneficiary as a food service 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 the proffered position is not a specialty occupation. On motion to reopen/reconsider, the director upheld the denial.

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.

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; (5) the petitioner's motion to reopen/reconsider; (6) the director's affirmation of the denial; and (7) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a food service 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 perform duties that entail implementing the banquet and catering service specializing in Colombian food and beverages; monitoring and coordinating compliance with health and fire regulations; planning menus and food consumption; organizing and managing training programs; resolving personnel problems; hiring new staff; and evaluating employee performance; coordinating assignments of cooking personnel; estimating food and beverage consumption; monitoring food preparation and methods and presentation; monitoring the budget, payroll records, and reviewing financial transactions; investigating and resolving patrons' complaints; reviewing menus and analyzing recipes to determine labor and overhead costs, and assign prices to menu items; and establishing and enforcing nutritional standards. The petitioner indicates that a candidate must possess a baccalaureate degree or its equivalent in hotel and restaurant management or dietetics.

The director concluded that the proffered position is not a specialty occupation. Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director stated that it shows that a baccalaureate degree is not required for a manager or food service manager.

The record contains counsel's August 25, 2003 letter wherein counsel states that the *Handbook* reveals that most companies require food service managers to have at least a bachelor's degree, and that a master's degree in business administration is desirable. Counsel states that the petitioner's degree requirement is appropriate, and that the SVP range of 7.0 to 8.0 indicates that the proposed position requires a bachelor's degree. The degree requirement, counsel contends, is common to the industry in parallel positions among similar organizations. According to counsel, the petitioner seeks the services of a food services manager to compete with other businesses and improve performance.

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 first considers 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.Minn. 1999)(quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In 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.

Counsel asserts that the proffered position is a specialty occupation based on the *Dictionary of Occupational Title's (DOT's)* SVP rating. The *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, 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. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. For this reason, the director did not err in discounting the *DOT* information.

The *Handbook* reveals that the proposed position's duties are a combination of those of a chef and a food service manager. The *Handbook* states that chefs are responsible for directing the work of kitchen workers, estimating food requirements, ordering food supplies, creating recipes, and preparing meals. The *Handbook* states that food service managers assist executive chefs in selecting successful menu items. It also states:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment, and facilities. Managers generally are responsible for all of the administrative and human-resource functions of running the business, including recruiting new employees and monitoring employee performance and training.

As described in the *Handbook*, executive chefs who work in fine restaurants require many years of training and experience. Some chefs start their training in high school or post-high school vocational programs. Others receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. Many are trained on the job.

The *Handbook* indicates that employers do not require food service managers to have a baccalaureate degree in a specific specialty. It reports that national and regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs. Although restaurant chains prefer to hire candidates with degrees in restaurant and institutional food service management, they often hire graduates with degrees in other fields. Furthermore, waiters, waitresses, chefs, and fast-food workers sometimes advance to assistant manager or management trainee jobs. Both 2- and 4-year programs, the *Handbook* states, provide instruction in "nutrition, sanitation, and food planning and preparation," and "accounting, business law and management, and computer science."

As discussed above, the *Handbook* reveals that the proposed position's duties are a combination of those of a chef and a food service manager, occupations that do not require a specific baccalaureate degree. As such, the evidence in the record fails to establish that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must show that a degree requirement is common to the industry in parallel positions among similar organizations or that proposed position is so complex or unique that it can be performed only by an individual with a degree. The record contains a letter from Mr. [REDACTED] that states, in part, the following about the food service industry:

It is the opinion of many researchers that those food service operations staffed with professional managers (i.e., managers with a bachelor's degree, preferably in hospitality management) are far more likely to be successful in the competitive food service industry than those that do not require a college degree. Statistics bear this out.

Based on this widely-studied phenomenon, I can state unequivocally that the petitioner is following common industry practice in requiring its managers to have a college degree.

According to Mr. [REDACTED] International University places over 200 students each year in management positions in the food industry.

This letter is not persuasive in establishing an industry-wide degree requirement. Mr. [REDACTED]'s reference to the placement of students in management positions actually corroborates the *Handbook's* information that management trainees are recruited from 2- and 4-year college hospitality management programs. Mr. [REDACTED] states that statistics reveal that food service operations staffed with professional managers (those with specific baccalaureate degrees) tend to be more successful. Yet, whether a business operation is to be more successful because employers require a specific bachelor's degree for a food service manager has little relevancy in proving an industry-wide requirement of a bachelor's degree.

As already discussed, the proposed position's duties are performed by chefs and food service managers, occupations that do not require a bachelor's degree. Consequently, the proposed position is not so complex or unique that it can be performed only by an individual with a degree.

The proposed position is newly created; therefore, the petitioner does not have a past practice of normally requiring a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Because the *Handbook* shows that the beneficiary's duties mirror those of a chef and food service manager, occupations that do not require a bachelor's degree, and no evidence in the record shows that the beneficiary's duties rise above this level, the petitioner fails to 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. 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 on this ground.

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.