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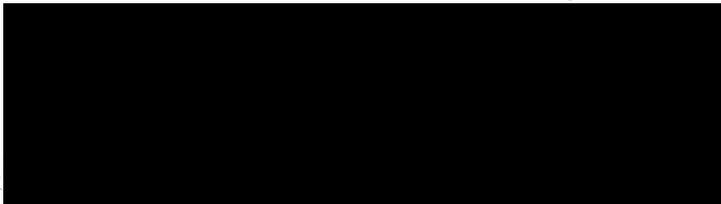
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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DR
MAR 30 2005



FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date:
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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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the Nebraska 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 hotel management company, operating 91 hotels in nine states. It seeks to hire the beneficiary as an operations manager for one of these hotels. The director denied the petition because he determined the proffered position did not meet the criteria required for classification as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with additional evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is the determination of whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An 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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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 nor 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 for entry into the occupation as required by the Act.

The petitioner states that it is seeking the beneficiary's services as an operations manager. Evidence of the beneficiary's duties includes: the Form I-129; a December 12, 2003 letter of support from the petitioner; and counsel's January 15, 2004 response to the director's request for evidence.

The petitioner provided a detailed description of the position's duties in its December 12, 2003 letter of support. As listed by the petitioner, the duties of its operations manager would focus on the food and beverage operations of the hotel in which he would work, requiring him to:

- Direct and coordinate activities of the operations department to obtain optimum use of kitchen and dining room equipment, facilities and personnel, ensuring employee compliance with administrative policies and procedures, safety rules and government regulations; and ensure all work is handled correctly, participating in disciplinary actions;
- Interview applicants for employment, recommending job offers; and provide training to new employees, as well as on-going training for existing employees;
- Handle complaints regarding food or service;
- Ensure maintenance of all equipment and cleanliness of work areas;
- Have responsibility for administrative duties, including inventory, scheduling, payroll, dealing with vendors, requisitioning equipment and supplies, and negotiating contracts with equipment and materials suppliers;
- Analyze financial information, preparing balance sheets, profit and loss statements and other reports to summarize the current and projected financial position of the restaurant for management review, and to determine requirements for food services; and
- Establish and implement, as necessary, accounting and accounting control procedures; and devise and implement, as necessary, a system for customer billing.

The AAO notes that in response to the director's request for evidence, the petitioner's description of the duties of the proffered position expanded to include management of the hotel's front desk, housekeeping,

maintenance and sales. However, the purpose of a request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot, therefore, offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a specialty occupation. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Accordingly, the AAO will not consider the additional responsibilities described by the petitioner in response to the director's request for evidence, as they materially alter the position described at the time of filing. Its analysis of the proffered position will rely on the petitioner's initial description of the position as overseeing food and beverage operations.

To make its determination whether the employment described by the petitioner qualifies as a specialty occupation, the AAO turns to 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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 his denial, the director, relying on the 2002-2003 edition of the DOL *Handbook*, determined that the duties of the proffered position were those of a food service manager. In light of the beneficiary's responsibility for the oversight of food and beverage services within the hotel where he would work, the AAO also concludes that the proffered position is that of a food service manager. The 2004-2005 edition of the *Handbook*, at pages 42-43, states the following with regard to the occupation of food service manager:

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, 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

Managers . . . estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies

In addition to their regular duties, food service managers perform a variety of administrative assignments

The *Handbook*, at page 24, also comments on the educational or training background required of those individuals who wish to work as food service managers:

Most food service management companies and national or regional restaurant chains recruit management trainees from 2- to 4-year college hospitality management programs. Restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions -- particularly self-service and fast-food -- are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager or management trainee jobs.

In that the *Handbook* indicates that those who seek employment as food service managers are not required to hold the minimum of a baccalaureate or higher degree in a field directly related to the occupation, the AAO concludes that the petitioner cannot establish its proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) -- that a degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In response to the director's request for evidence, counsel submitted 12 Internet job postings for management positions within the hotel industry. However, these job announcements do not establish the petitioner's degree requirement as the norm within its industry.

Of the 12 online postings, none advertises employment that can be identified as parallel to the proffered position, as required at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The announcements either offer no description of the duties of the advertised job or indicate responsibilities unrelated to the management of hotel food and beverage services, the focus of the proffered position's duties. Further, with three exceptions, the announcements submitted state only a generic degree requirement or a willingness to accept experience as a substitute for a degree. As already noted, however, the three announcements that do specify a particular degree fail to describe positions parallel to the proffered position. Accordingly, the AAO finds the petitioner to be unable to establish its position as a specialty occupation under the first prong of the second criterion. With regard to the criterion's second prong, the AAO finds nothing in the record to establish that the position is either so complex or unique that it can be performed only by a degreed individual.

On appeal, counsel submits a university professor's evaluation of the proffered position and the level of education required to perform its duties. This professor, based on his academic training and experience, finds the position to be a specialty occupation and a bachelor's degree in hotel and restaurant management to be the industry standard for operations managers. While the professor's opinion is relevant to this proceeding, it is unsupported by independent evidence. As a result, it is insufficient proof that the petitioner's industry normally requires a degree when employing food service managers. 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). Further, counsel

has submitted documentation of the professor's position of authority in the operation of his university's programs that recognize learning outside the classroom. This authority, however, is not probative in establishing the proffered position as a specialty occupation.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

To determine a petitioner's ability to meet the third criterion, CIS normally reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held the position, as well as the petitioner's hiring practices with regard to similar positions. While the petitioner has submitted no evidence to establish its hiring practices with regard to the proffered position, counsel's January 15, 2004 response to the director's request for evidence provided what he described as the resumes and diplomas of individuals employed by the petitioner in the same or similar positions. Counsel contends that this material establishes that the petitioner normally requires a degree when hiring operations managers. The AAO does not agree. It finds the record to contain no evidence to document the petitioner's employment of the individuals whose resumes have been submitted. Counsel's statements and these resumes do not constitute proof of employment. The AAO notes that, while several of these individuals' resumes identify their employer as the petitioner, the others list only the hotel at which they work and do not indicate the petitioner employs them. Accordingly, the AAO finds that the petitioner is unable to establish that it normally imposes a degree requirement with regard to the proffered position, as required at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) allows a petitioner to establish its position as a specialty occupation if it can prove that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. In making its determination, the AAO has again reviewed the duties of the proffered position, as described by the petitioner at the time of filing, to determine whether the position's responsibilities reflect a higher degree of knowledge and skill than would normally be required of a manager overseeing hotel food and beverage operations. It concludes that the position's duties, while they may impose a range of responsibilities on the beneficiary, are no different than the duties routinely performed by food service managers across the hotel industry. As a result, the AAO concludes that proffered position does not qualify as a specialty occupation under the fourth criterion.

Therefore, for reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.