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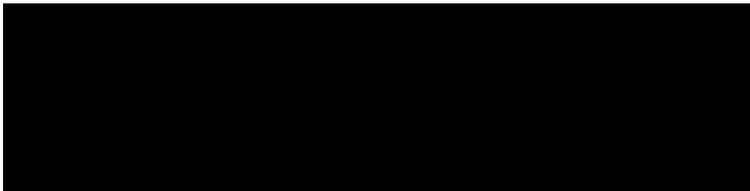
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FILE: SRC 04 060 50240 Office: TEXAS SERVICE CENTER Date: SEP 19 2005

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:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All materials 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

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner owns and operates a South American seafood restaurant. It seeks to employ the beneficiary as a food service manager and to classify him 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 ground that the record failed to establish that the proffered position qualifies as 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.

As provided in 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 evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) Form I-290B, counsel's appeal brief, and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner owns a South American seafood restaurant in Houston, Texas, established in 2002, with five employees and estimated gross annual income of \$200,000. In a letter accompanying Form I-129 the petitioner stated that it proposed to hire the beneficiary as its food service manager, and provided the following description of the position:

[The beneficiary] will select, prepare, elaborate, direct and plan different menus. He will oversee staffing of kitchen and dining room operations. He will maintain health, safety and sanitation levels. He will innovate and establish standards for personnel performance, service to customers, menu rates, and advertising and publicity. He will be responsible for the quality of the food, kitchen equipment and inspection of the premises to maintain health, safety and sanitation regulations, estimate cost of food and beverage, and requisition or purchase supplies. He will coordinate the overall operations of menu planning, bar and banquet activities, staffing functions, and interact with customers and vendors. He will assist the General Manager to perform detailed clerical and financial duties such as directing payroll operations, handling of revenue, and taking inventory. Moreover, [the beneficiary] will improve our current menu and will introduce new South American dishes.

The petitioner asserted that the beneficiary is qualified for the job based on his high school education in Argentina and nearly fourteen years of experience as an executive chef in Mexico.

The director determined that the proffered position is not a specialty occupation. The director cited information in the Department of Labor (DOL)'s *Occupational Outlook Handbook (Handbook)* indicating that a baccalaureate level of education in a specific specialty is not the normal, industry-wide minimum requirement for entry into a food service manager position. Job postings in the record from other restaurants looking for executive chef/food service managers did not require a baccalaureate degree in a specific specialty, the director noted, and there was no evidence that the petitioner had previously required a specialty degree for the proffered position. Nor did the record establish that the duties of the position are so specialized or complex that they require a bachelor's degree in a specific specialty. The director concluded that the position does not qualify as a specialty occupation under any of the criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel asserts that the food service manager position meets the statutory definition and all four regulatory criteria of a specialty occupation. According to counsel, the director misinterpreted the *Handbook* in concluding that food service managers do not require a baccalaureate degree. Counsel refers to a publication of the Higher Education Personnel Board stating that the minimum educational qualification for a food service manager is a bachelor's degree in institution management, hotel and restaurant administration, home economics, business administration, or a related field, and some work experience. The proffered position requires a bachelor's degree, or its equivalent, and work experience in the restaurant industry, counsel maintains, so that the petitioner can compete effectively, because of the complex nature of the restaurant business, and because the job duties are specialized and complex.

In determining whether a position meets the statutory and regulatory criteria of a specialty occupation, CIS routinely consults the DOL *Handbook* as an authoritative source of information about the duties and educational requirements of particular occupations. Factors typically considered are whether the

Handbook indicates a degree is required by the industry; 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*, 764 F.Supp. 1095, 1102 (S.D.N.Y. 1989)). CIS also analyzes the specific duties and complexity of the position at issue, with the *Handbook's* occupational descriptions as a reference, as well as the petitioner's past hiring practices for the position. See *Shanti, Inc. v. Reno, id.*, at 1165-66.

As indicated by the director in his decision, the proffered position in this case falls within the *Handbook's* occupational category of food service managers. The occupation is described in the *Handbook*, 2004-05 edition, at 42:

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.

The AAO agrees with the director that a baccalaureate degree in a specific specialty is not the normal minimum requirement for entry into a food service manager position. As explained in the *Handbook's* description of the training and education required for the occupation:

Most food service management companies and national or regional restaurant chains recruit management trainees from two- and four-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 [G]eneral managers need prior restaurant experience, usually as assistant managers.

A bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation. A number of colleges and universities offer four-year programs in restaurant and hotel management or institutional food service management. For those not interested in pursuing a four-year degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification.

Handbook, 2004-05 edition, at 44. What the *Handbook* makes clear is that, even if many food service managers have baccalaureate degrees in restaurant or food service management, there is ample

opportunity to enter the occupation with credentials short of a four-year specialty degree – such as a baccalaureate degrees in another field, an associate degree, or work experience in the restaurant industry (like the beneficiary's in this petition). Accordingly, the proffered position at issue in this petition does not meet the first alternative criterion of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

In regard to the second alternative criterion of a specialty occupation, at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2), the record includes a series of internet job announcements for food service manager positions. Of the five submitted on appeal, however, only two indicate that an “ideal candidate” should have a bachelor's degree in the culinary arts, institutional management, or a related specialty. The other three merely indicate that a bachelor's or associate's degree is required, without identifying a particular specialty. Of the four internet job announcements for food service managers previously submitted, only one indicated that a bachelor's degree in a specific job-related specialty was required. The other three merely indicated that a bachelor's or associate's degree was required, without identifying a particular specialty, or that equivalent work experience would suffice. Furthermore, the petitioner has not established that the companies posting the internet job announcements are similar in size and scope to the petitioner. Thus, the internet job announcements do not establish that a degree requirement in a specific specialty is a common industry-wide requirement for food service managers in restaurants similar to the petitioner's. Counsel's reliance on information from the Higher Education Personnel Board is also deficient. The published excerpt in the record states that food service managers who “[p]lan, organize and direct operations in a large food service installation or in a medium-sized food service installation” require a bachelor's degree in institution management, hotel and restaurant administration, home economics, business administration, or a related field. The position at issue in the instant petition, however, is a food service manager for a small restaurant with five employees. Thus, the position(s) described by the Higher Education Personnel Board are not parallel to the proffered position. Accordingly, the evidence of record does not establish that the proffered position qualifies as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the record establish that the food service manager position is so complex or unique that it can only be performed by an individual with a bachelor's degree in a specific specialty. Accordingly, the proffered position does not qualify as a specialty occupation under the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A)(2).

As for the third alternative criterion of a specialty occupation, the proffered position is newly created and the petitioner has no hiring history for it. Accordingly, the petitioner cannot demonstrate that it normally requires a bachelor's degree in a specific specialty or its equivalent for the position, as required for it to qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the evidence of record does not establish that the specific duties of the food service manager are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree. Accordingly, the proffered position does not meet the fourth alternative criterion of a specialty occupation at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(4).

For the reasons discussed above, the record does not establish that the food service manager position qualifies as a specialty occupation under any of the criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). The record does not establish that the beneficiary will be coming temporarily to the United States to

perform services in a specialty occupation, as required under section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The petitioner bears the burden of proof in these proceedings. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the AAO will not disturb the director's decision denying the petition.

ORDER: The appeal is dismissed. The petition is denied.