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**U.S. Citizenship
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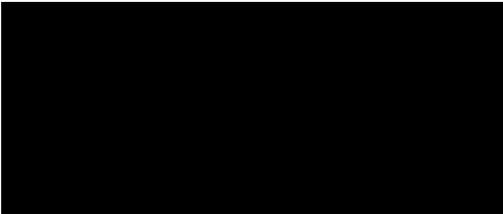


FILE: WAC 04 144 53321 Office: CALIFORNIA SERVICE CENTER Date: JAN 27 2006

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 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

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 food services restaurant that seeks to employ the beneficiary as a restaurant general 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 appeal, counsel states that the proposed position is a specialty occupation and submits additional and previously submitted evidence.

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; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a restaurant general manager. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail managing, directing daily operations, and coordinating service and financial activities; reviewing and estimating food consumption, food and beverage costs, and requisitions; determining and ascertaining that sufficient items are ordered with suppliers; inspecting food service facilities to ensure that equipment and buildings meet the petitioner's standard and state and local health laws; inspecting prepared food to maintain the petitioner's reputation, high quality standards, and sanitation regulations; analyzing information concerning operations such as daily food sales, patron attendance, and labor costs to prepare the budget, and maintain cost control of the facility operations; interfacing with financial institutions, architects, the landlord, accountants, and lawyers; meeting with restaurant suppliers' sales representatives; maintaining records through use of a point of sale (POS) computerized inventory system; overseeing financial transactions and monitoring the budget to ensure efficient operation and that expenditures stay within budgeted limits; analyzing the popularity of dishes, the amount of unserved food, and the need to change the menu to increase profits and minimize waste; preparing budgetary reports; conferring with kitchen management to plan menus and manage the staff of hosts and waiters in day-to-day operations; investigating and resolving food or service quality complaints; managing marketing and advertising and representing the petitioner at industry conferences and local promotional events; arranging for advertisements in newspapers, publications, and telephone and tourist directories; contacting media sources to negotiate promotional advertisement campaigns; negotiating contracts with delivery services, wholesale catering vendors, and customers; conducting research programs to improve existing practices and services and to attract new customers; recruiting and hiring personnel; assigning duties and schedules; and overseeing training. For the proposed position the petitioner requires a baccalaureate degree in the culinary arts or restaurant or hospitality management.

The director stated that the proposed position resembles a food service manager and general manager as those occupations are depicted in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* conveys that those occupations do not require a baccalaureate degree in a specific specialty. The director found the submitted letters from [REDACTED] unpersuasive in establishing that the proposed position requires a baccalaureate degree in a specific specialty. The director stated that the petitioner's business did not extend beyond the scope of the local community and that its services are limited to the neighborhood or immediate vicinity of its operation or to a particular part of a metropolitan area. The director concluded that the petitioner lacks an extensive or complex customer base that would require the services of a general manager with a baccalaureate degree in a relevant field, and that the general manager would not need to direct a substantial state, regional, national, or international business network of staff to provide the petitioner's product or service. The director stated that no evidence establishes that the petitioner normally requires a degree or its equivalent for the proposed position. The director

discussed *Defensor v. Meissner*, 201 F. 3d 384, 387 (5th Cir. 2000). According to the director, the petitioner failed to distinguish the proposed position from that of a food service manager and general manager, which are occupations that do not require a baccalaureate degree in a specific specialty.

On appeal, counsel asserts that CIS did not properly consider the submitted evidence which shows that the proposed position is a specific specialty, and counsel refers to information in the *Dictionary of Occupational Titles (DOT)*; an excerpt from *Matthew Bender Immigration Law and Procedure*, the *Occupational Information Network Online (O*Net)*, and the *Handbook*; an expert opinion letter from [REDACTED] the dean of the College of Culinary Arts at Johnson & Wales University; an excerpt from the Johnson & Wales University website; an expert opinion letter from [REDACTED] of the American Culinary Institute and an excerpt from the American Culinary Institute website; reviews about the petitioner's reputation; and the petitioner's April 14, 2004 support letter. Counsel asserts that the petitioner, a nationally renowned Indian cuisine restaurant, has historically employed university-trained professionals for this and similar positions, and that CIS has previously granted H-1B petitions to this restaurant group for the same and similar positions. Counsel states that the regulations do not support the director's statement that the direction of "a substantial state, regional, national, or international business network staff" is needed to justify the requirement of a degree in a specific specialty. Counsel states that the petitioner met the burden of proof, which is a preponderance of the evidence, in establishing that the proposed position qualifies as a specialty occupation.

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.

Counsel asserts, without submitting any supporting evidence, that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. The statements of counsel on appeal or in a motion, however, are not evidence and thus are not entitled to any evidentiary weight. See *INS vs. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

The AAO next 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)).

Counsel's reference to and assertions about the relevance of information from the *DOT* and *O*Net* is not persuasive. Neither an SVP rating nor a Job Zone category indicates that a particular occupation requires the attainment of a baccalaureate or higher degree, or its equivalent, in a specific specialty as a minimum for

entry into the occupation. An SVP rating and Job Zone category are meant to indicate only the total number of years of vocational preparation required for a particular position. Neither classification describes how those years are to be divided among training, formal education, and experience, nor specifies the particular type of degree, if any, that a position would require.

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.

In the denial letter the director stated that the petitioner's business did not extend beyond the scope of the local community; that its services are limited to the neighborhood or immediate vicinity of its operation or to a particular part of a metropolitan area; and that the petitioner lacks an extensive or complex customer base that would require the services of a general manager with a baccalaureate degree in a relevant field, and that the general manager would not need to direct a substantial state, regional, national, or international business network of staff to provide the petitioner's product or service. The AAO finds that the director's observations are not relevant in determining whether the proposed position qualifies as a specialty occupation under the Act and the regulations.

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. 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 an executive chef determines serving sizes, plans menus, orders food supplies, and oversees kitchen operations to ensure uniform quality and presentation of meals. The *Handbook* also conveys that an executive chef may be "in charge of all food service operations and also may supervise the many kitchens of a hotel, restaurant group, or corporate dining operation." 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* 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.

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.”

Counsel asserts that the submitted restaurant reviews show that the petitioner is a nationally renowned Indian cuisine restaurant; that the petitioner requires the services of a restaurant general manager with a baccalaureate degree in the culinary arts or restaurant or hospitality management; and that the *Handbook's* discussion about food service managers, and letters from [REDACTED] demonstrate this.

The AAO does not concur with counsel's assertion as the *Handbook* does not indicate that employers require a baccalaureate degree in a specific specialty for a chef or a food service manager, which are occupations that are similar to the proposed position. The *Handbook* conveys that executive chefs who work in fine restaurants, such as the petitioning entity, require many years of training and experience. The *Handbook* does not indicate that employers require that a chef possess a baccalaureate degree in a specific specialty. For food service managers, the *Handbook* relays that employers do not require a baccalaureate degree in a specific specialty, as indicated above. Restaurant chains prefer to hire candidates with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields. Waiters, waitresses, chefs, and fast-food workers sometimes advance to assistant manager or management trainee jobs. Both 2- and 4-year programs, the *Handbook* reports, provide instruction in areas required of the proposed position: “nutrition, sanitation, and food planning and preparation,” and “accounting, business law and management, and computer science.”

The letters from [REDACTED] are relevant; however, the assertions in the letters conflict with the *Handbook's* information. In a July 10, 2003 letter [REDACTED] asserts:

Although historically many [c]hefs and managers learned their skills in various related jobs, the leading hotels and fine restaurants in the industry in American today routinely require applicants to hold at least a relevant bachelor's degree for management positions. This is because of the increased complexity of a profession that requires a greater degree of understanding in financial management, computerized inventory and delivery control systems, human resource skills, and participation in business planning/operations at a management level as well as the complex field of cooking.

The *Handbook* conveys “technology influences the jobs of food service managers.” The *Handbook* also states:

Many restaurants use computers to track orders, inventory, and the seating of patrons. Point-of-service (POS) systems allow servers to key in a customer’s order, either at the table, using a hand-held device, or from a computer terminal in the dining room. The same system . . . tracks sales. To minimize food costs and spoilage, many managers use inventory-tracking software to compare the record of sales from the POS with a record of the current inventory. Some establishments enter an inventory of standard ingredients and suppliers into their POS system. When supplies of particular ingredients run low, they can be ordered directly from the supplier using preprogrammed information. Computers also allow restaurant and food service managers to keep track of employee schedules and paychecks more efficiently.

The knowledge that is required of a food service manager, as described by [REDACTED], is encompassed within the duties of a food service manager, which is an occupation that does not require a baccalaureate degree in a specific specialty. The *Handbook* describes how food service managers use computer systems and programs in performing their duties; how food service managers must “be good communicators”; and how 2- and 4-year programs would provide instruction in areas concerning the proposed position such as “nutrition, sanitation, and food planning and preparation,” and “accounting, business law and management, and computer science.” Thus, a food service manager, an occupation that does not require a baccalaureate degree, possesses the kind of knowledge that is described by [REDACTED]. The AAO has already discussed the duties of a chef and the *Handbook’s* statement that this occupation, even when employed by a fine restaurant, does not require a baccalaureate degree. The weight of [REDACTED] letter is diminished by the *Handbook’s* information. With respect to the assertions of [REDACTED] going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

In a September 9, 2004 letter [REDACTED] asserts:

The job duties of the [proposed] position demonstrate the need for the bachelor’s degree. In my opinion, these duties and the degree requirement are both normal within the industry among employers of a similar stature.

The *Handbook’s* information, as discussed above, reveals that the proposed position does not require a baccalaureate degree in a specific specialty. The value of [REDACTED] assertion is therefore diminished by the *Handbook’s* information. In addition, with regard to [REDACTED] assertions, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of*

California, 14 I&N Dec. 190 (Reg. Comm. 1972)). Again, CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The AAO's conclusion, from the evidence to which it has referred, is that the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) the petitioner must show that a specific degree requirement is common to the industry in parallel positions among similar organizations. The AAO has already discussed the letters from [REDACTED] and the diminished weight of this evidence. No other evidence in the record establishes the first alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has not satisfied the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) as no evidence in the record shows the proposed position as so complex or unique that it can be performed only by an individual with a degree. The evidence in the record such as the letters from [REDACTED] and the restaurant reviews are insufficient to establish the proposed position as so complex or unique as to require an individual with a baccalaureate degree in a specific specialty. Moreover, the *Handbook's* information reveals that the proposed position parallels a chef and a food service manager, which are occupations that do not require a bachelor's degree in a specific specialty. Consequently, the petitioner fails to establish the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), the petitioner must show that it normally requires a degree or its equivalent for the position. Although counsel asserts that the petitioner has historically employed university-trained professionals for this and similar positions, and that CIS has previously granted H-1B petitions to this restaurant group for the same and similar positions, no evidence in the record substantiates this assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

In a April 12, 2004 letter the petitioner also asserts that it "normally requires this degree or its equivalent as a minimum requirement for entry into this specialty occupation." However, no independent documentary evidence supports this assertion. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must establish 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. The *Handbook* reveals that the proposed duties are a combination of those of a chef and a food service manager, and that those occupations do not

require a baccalaureate degree in a specific specialty. The submitted evidence, which the AAO has already discussed, does not reflect that the proposed duties require the knowledge that is associated with the attainment of a baccalaureate or higher degree in the culinary arts or restaurant or hospitality management. As such, the petitioner fails to establish this last criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

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.