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FILE: EAC 03 030 53722 Office: VERMONT SERVICE CENTER Date: DEC 14 2007

IN RE: Petitioner:
Beneficiary:



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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 claims that it provides food service and food service management and was established in 1998. It employs an indeterminate number of employees and in 2005 had \$2,534,094 stated gross income.¹ It 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 petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. On appeal, counsel contends that the director erred in denying the petition, and that the proposed position qualifies for classification as a specialty occupation.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; (5) the petitioner's motion to reopen and reconsider the director's denial (MTR); (6) the director's denial of the petitioner's MTR; (7) the Form I-290B, counsel's appeal brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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:

¹ The Form I-129 states that the petitioner employs 25 individuals. On appeal, counsel submits a quarterly taxable wage report for Universal Baking Co. Inc. for the second quarter of 2006 listing 63 employees and, in his brief, counsel states that the petitioner has more than 30 employees. The Form I-129 states that the petitioner had a gross annual income of \$1.7 million at the time of filing. On appeal, counsel submits a corporate tax return indicating gross income of \$2,534,094 of Universal Baking Co. Inc./All About Food Campus Diner in 2005 and, in his brief, counsel states that the petitioner is "a company of \$3+ million."

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.

The petitioner states that it is seeking the beneficiary's services as a food service manager. Evidence of the beneficiary's duties includes: the petitioner's November 1, 2002 letter of support; the petitioner's June 2, 2003 letter in response to the director's RFE; counsel's June 3, 2003 brief in response to the director's RFE; and counsel's September 14, 2006 appeal brief. The duties described in the petitioner's November 1, 2002 letter, counsel's June 3, 2003 brief in response to the director's RFE, and counsel's September 14, 2006 appeal brief are identical and state the following duties:

In addition to performing the regular duties of a food service manager, she will be responsible for the entire management of the food service including kitchen and food quality. She will coordinate activities and direct indoctrination of staff engaged in managing and preparing and cooking food in our restaurant to ensure an efficient and profitable food service. She will also plan or participate in planning menus and utilization of food surpluses and leftovers, taking into account probable number of customers, marketing conditions, popularity of various dishes, and recency of menu. Estimate food consumption, and purchase or requisition foodstuff and kitchen supplies. Review menus, determine food, labor and

overhead costs and assign prices to menu items. Direct food apportionment policy to control costs. Supervise cooking and other kitchen and restaurant personnel and coordinate their assignments to ensure economical and timely food production. Observe methods of food preparation and cooking, size of portions and quality to ensure food is prepared in prescribed manner.

In addition to the foregoing, the beneficiary will also perform the following duties:

She will ensure efficient and profitable operation by delegating proper authority to restaurant personnel to meet guests' requests, work responsibilities and training. Hire, train and supervise both managerial and non-managerial employees.

Direct the operations of the restaurants to achieve the highest standards of performance.

Participate in daily property inspections and assist the management in the maintenance and upkeep [of] the quality standards for the restaurant.

Meet with the Executive Committee to review restaurant food quality and management and to develop strategies for improvement.

Participate in weekly yield management meetings.

Regularly meet with [the] president to discuss problems and assist as needed in the operation.

Analyze restaurant operation on daily, weekly, and monthly basis.

Keep all staff informed of company policies, activities and strategies and encourage associates' suggestions, involvement and open dialogue.

Ensure guests' satisfaction by soliciting feedback from customers on a continuous basis.

Monitor the budget to ensure efficiency in operations.

Investigate and resolve food quality complaints.

Perform other duties assigned by the management.

In the response to the RFE, the petitioner stated the following:

The responsibilities of our food service manager position are complex with respect to culinary and business management skills. The food service manager will have full charge of the culinary operations, including food styling, menu evolution, and quality of food

preparation. The food service manager is also responsible for food costing and negotiating with vendors, preparing a detailed budget, and training and overseeing the work for chefs, cooks, and kitchen personnel. These responsibilities include:

Training, instructing, and overseeing sous chefs, banquet chefs, cooks and other kitchen and service personnel; training kitchen personnel in sanitation practices, refrigeration control points and other sanitary controls; (as a group, these comprise approximately 35% of the time of the position on a weekly basis);

Controlling food costs by establishing purchasing specifications, storeroom requisition systems, product storage requirements, standardization recipes and waste control procedures; preparing and submitting a detailed budget and including both kitchen and service staff items; budget will include payroll and related costs, supplies, repairs and maintenance, linens, utilities and expenditures; meeting with the Executive Committee to discuss problems, develop strategies for improvement, and assist as needed in other areas of the operation; (as a group, these comprise approximately 35% of the time of the position on a weekly basis);

Planning and setting menus; establishing quality standards for all menu items and food preparation practices; work with Chef in developing special dishes for various occasions; Work with Chef in researching and preparing new dishes and menus, as well as instructing staff on preparation of new dishes; (as a group, these comprise approximately 20% of the time of the position on a weekly basis);

Conducting and participating in national and local food festivals to promote [REDACTED] nationally and locally; (this comprises approximately 10% of the time of the position on an annual basis).

In its letter in response to the director's RFE, the petitioner states "I have revised the wording of the description of these duties from my letter of November 1st, 2002 to make it possible to list the percentages of time to be spent in the various duties. There is no actual change in the proposed duties." The AAO notes that although the initial description of duties refers to the "operations of the restaurants" and "the quality standards of the restaurant," the petitioner's letter in response to the RFE only refers to "[REDACTED]" in its description of duties. In its November 1, 2002 letter, the petitioner describes itself as a "New York Corporation, which has undertaken an ambitious project of establishing various fine dining and restaurant facilities throughout the city," but does not name the facilities. On appeal, counsel includes copies of the All About Food websites without clarifying the nature of the petitioner's business. All About Foods is described as a catering business as well as an umbrella of restaurants established in 1981 which "will consist of" five restaurants, none of which are named [REDACTED]. The nature of the relationship between Universal [REDACTED], Inc. and All About Food is also not clear. According to the New York State Department of State Division of Corporations, Universal Baking Co., Inc. is an active New York corporation incorporated on January 5, 1998 and All About Food Corp. is also an active New York corporation incorporated on September 12, 2007. The two corporations have provided the New York State Department of State Division of

Corporations different mailing addresses. The address provided to the New York State Department of State Division of Corporations for [REDACTED] is the address listed for the petitioner in the Form I-129. Based upon the record of proceeding, the AAO is unable to determine who the petitioner is or the extent of the complexity of its business. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The record does not contain sufficient documentation related to the petitioner's operations or organizational structure that would shed light on the complexity of the food service management work to be performed by the beneficiary, e.g., financial documents or reports that evidence the complexity of the petitioner's operations. 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)). The petitioner has not provided documentary evidence establishing that its business has the complexity of operations to require that the proffered position require a degree in hospitality or restaurant management.

To make its determination as to whether the employment described in the record 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) which require that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position, or that 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 determining whether a proposed 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 first turns to the *Handbook* for its discussion of food service managers. As stated by the *Handbook*, 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's* information about the qualifications of food service managers is as follows:

Experience in the food services industry, whether as a full-time waiter or waitress or as a part-time or seasonal counter attendant, is essential training for a food services manager. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs which require internships and real-life experience to graduate. Some 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 experience, interest and aptitude. Many 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. Executive chefs need extensive experience working as chefs, and general 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. Almost 1,000 colleges and universities offer 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs offer graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-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. Both 2- and 4-year programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. . . .

The *Handbook* reports that for the position of food service manager, "a bachelor's degree in restaurant and food service management provides particularly strong preparation." It does not however, indicate that a baccalaureate degree is the minimum educational requirement for food service managers. The *Handbook's* discussion of the occupation of food service managers clearly indicates that food service manager positions may be filled by "promoting experienced food and beverage preparation and service workers" or by "waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility." Specific requirements vary by employer. Accordingly, the listed duties do not establish the proffered position as a specialty occupation under the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In response to the RFE, counsel included copies of bachelor degree programs in culinary arts and restaurant/hotel management and asserted that such programs are evidence that a bachelor's degree is becoming the industry standard. The *Handbook* does not support counsel's assertion. Counsel submits no evidence showing that these programs dictate the hiring standards of employers. 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)).

Counsel's reference to and assertions about the relevance of information from the *DOT* are not persuasive in establishing the proposed position as a specialty occupation. Neither the *DOT's* specific vocational preparation (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.

Based on the evidence in the record, the AAO finds 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 its degree requirement as the norm within its industry under the first prong of the second criterion, the petitioner submits several job advertisements for food service managers. None, however, satisfy the requirements for establishing an industry standard. Of the advertisements submitted, none of the organizations appear similar to the petitioner. Some of the postings are for industries different from the petitioner's, or state that a degree is "preferred," or the employers accept an associate's degree. Also, many of the companies appear to be larger than the petitioner. Furthermore, because the nature of the relationship between [REDACTED], Inc. and [REDACTED] is unclear, the AAO is unable to determine whether any of the postings for food services companies are similar to the petitioner.

In response to the RFE, counsel submitted seven industry standard letters from different companies that claim to be in the same industry as the petitioner. The letters appear to be written by the same person thus lessening their evidentiary weight. Further, the letters do not provide enough information about the companies so as to determine if they are similar to the petitioner. Also, as stated above, because the nature of the relationship between [REDACTED] and [REDACTED] is unclear, the AAO is unable to determine whether any of these companies are similar to the petitioner. The authors of the letters do not cite industry trade data or surveys in support of their conclusions. Although the letters do state that it is customary to require a bachelor's degree in food service management or the equivalent in the New York food industry, 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Therefore, the proffered position may not be established as a specialty occupation based on an industry-wide degree requirement. The petitioner has not satisfied the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires that the petitioner prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The record contains no evidence that would support a finding that the position proposed here is more complex or unique than such positions at organizations similar to the petitioner. Consequently, the petitioner fails to establish the second alternative prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

To determine whether a proffered position may be established as a specialty occupation under the third criterion, which requires that the employer demonstrate that it normally requires a degree or its equivalent for the position, the AAO usually reviews the petitioner's past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas. The petitioner has not shown that it has previously hired personnel with a bachelor's degree requirement for the position of food services manager. Although the petitioner states that it has required a bachelor of science for the position since its inception, the record of proceeding only contains one diploma for a prior employee. In response to the RFE, counsel submitted a diploma for ██████████ for a bachelor of commerce from Nagpur University and two uncashed checks for ██████████. There is no evidence in the record of proceeding that ██████████ ██████████ are the same person. In his appeal brief, counsel states that the petitioner has "employed food service managers with bachelor's degrees in the past. However, this person has left the company and we have filed this petition to fill the vacancy." The AAO notes that the petitioner filed the Form I-129 petition on November 5, 2002 and the quarterly taxable wage report for the second quarter of 2006 ██████████ as an employee. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Moreover, 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 for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The fourth criterion requires a petitioner to establish that the nature of the specific duties of its position is so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a baccalaureate or higher degree. To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The evidence of record fails to establish that the proffered position meets the specialized and complex threshold at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Counsel asserts that CIS has already determined that the proffered position is a specialty occupation since the AAO has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to the AAO in the prior cases. In the absence of all of the corroborating evidence contained in those records of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior cases were similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition was approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. Citizenship and Immigration Services (CIS) is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Beyond the decision of the director, the beneficiary does not appear to be qualified to perform the duties of the specialty occupation. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), the AAO does not accept the conclusion, reached by Dr. [REDACTED] that the beneficiary has attained the equivalent of a bachelor's degree in business administration, restaurant management. The evaluator based his evaluation of the beneficiary's bachelor's degree in commerce from the University of Mumbai, her diploma in business administration from Sharda College of Management Studies, and her work experience. On the last page of the evaluation, Dr. [REDACTED] states that, based on his positions at Queens College of the City University of New York, he has the authority to evaluate whether the school is to grant college-level credit for experience and/or training, and/or courses taken at other U.S. or international universities. However, the record does not contain a letter from the dean or provost of Queens College of the City University of New York establishing that Dr. [REDACTED] has such authority or that the university has a program for granting credit based on training and/or experience. Thus the petitioner has not established that the beneficiary is qualified to perform the services of a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). Citizenship and Immigration Services (CIS) uses an evaluation by a credentials evaluation organization of a person's foreign education as an advisory opinion only. However, this evaluation is based upon a combination of the beneficiary's education 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). For this additional reason, the petition may not be approved.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary is qualified to perform the services of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial.

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.