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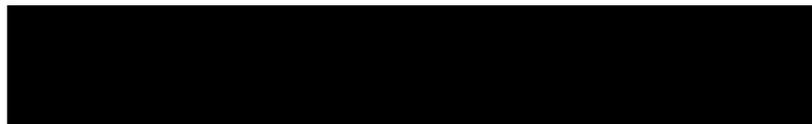
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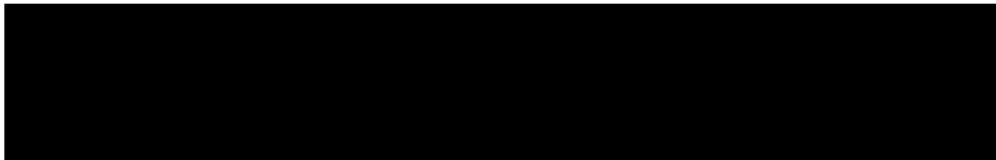
FILE: EAC 05 128 51195 Office: VERMONT SERVICE CENTER Date:

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 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 restaurant that seeks to employ the beneficiary as its 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 determining that the record failed to establish the proffered position 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 evidence; (3) counsel's response to the director's request; (4) the director's denial letter; (5) counsel's motion to reopen; (6) the director's decision on the motion to reopen; and (7) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the 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 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.

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 seeks the beneficiary’s services as a restaurant manager. Evidence of the beneficiary’s duties includes: the Form I-129; counsel’s March 31, 2005 cover letter in support of the petition; and counsel’s July 29, 2005 response to the director’s request for evidence. As stated by the petitioner, the duties of the proffered position fall into the following three components:

1. Oversee the kitchen operations; work closely with the executive chef to monitor food costs and approve ongoing menu innovations and seasonal adjustments; oversee the kitchen staff and spot-check inventory controls and regulations;
2. Oversee the overall operations and presentation of the “Front of the House”; supervise management staff; and take part in the recruitment, hiring, and training of professional staff; and
3. Perform administrative duties; provide financial updates to the petitioner’s owner; consult with outside accountants and oversee in-house bookkeeper and administrative clerk; and periodically review employment, payroll, and licensing regulations for accuracy.

To make its determination whether the employment just described 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)).

The director found that the record does not contain evidence that the petitioner has an established employment policy or practice of requiring a bachelor's degree for the proffered position. The director also found that the petitioner has not established that the proposed duties are so complex as to require a related bachelor's degree. The director found further that the scope of the petitioner's business does not correspond with the businesses described in the industry letters. Citing the *Handbook*, 2002-2003 edition, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific specialty. The director concluded that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel states, in part, that the proposed duties, which entail overseeing a complex multi-million dollar business, are so complex as to require a related bachelor's degree. Counsel states further that the petitioning business, which is a *bona fide* Irish pub and restaurant, "is a forum for Irish folk and concert musicians and a patron of Irish parades, charities and literature," thereby requiring a four-year degree. Counsel also states that although the petitioner is a start-up operation without an extensive hiring history, every permanent manager it has hired has had a four-year degree or its equivalent. Counsel submits job advertisements and industry letters as supporting documentation.

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 routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. Although counsel asserts that a close reading of the current edition of the *Handbook* supports the petitioner's case, the AAO disagrees. The *Handbook* reports that the educational requirements for a position as a food service manager varies. The *Handbook* indicates:

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 services workers.

The *Handbook* also recognizes: "[a] bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation," and "[f]or 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."

The AAO observes that the *Handbook* does not specifically discuss management positions at independently owned high-end restaurants but does provide a general understanding of the educational requirements for an individual to perform the duties of a restaurant manager. The AAO concurs with the director's determination that the *Handbook* does not include discussion indicating that a bachelor's degree or its equivalent in a specific discipline is a requirement to perform the duties of this occupation. The variety of paths available to enter into a restaurant manager position precludes the conclusion that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of a restaurant manager. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Regarding parallel positions in the petitioner's industry, counsel submits letters from three restaurant proprietors. The first letter is from [REDACTED] the director of human resources for Jurys Doyle Hotel Group, an international business with hotels and restaurants in 24 cities throughout the United Kingdom, Ireland, Scotland, and the United States. [REDACTED] indicates that the organization's U.S. businesses include two four-star hotels that both feature a high-end restaurant and Irish pub, and that the managers of such "higher-end" establishments – especially in competitive markets – need a more advanced, college-level education and training. [REDACTED] opines:

Perhaps the most complex and demanding managerial positions are high-end, single-business establishments such as upscale, independent restaurants in competitive urban and resort markets. The managers of those establishments must function at the highest levels in order to successfully compete. To do so requires experience and expertise in, among other areas, financial systems, inventory control systems, marketing, human resources as well as knowledge and skills specific to the hospitality industry.

The second letter is from [REDACTED] proprietor of two restaurants in the Washington/Baltimore area - Ireland's Four Courts and [REDACTED] Irish Pub and Restaurant – and "also the proprietor of a restaurant consulting company that specializes in providing the marketing and management consulting to persons desirous of establishing authentic Irish Restaurants in the United States." [REDACTED] claims his experience qualifies him "to attest to standard professional requirements for authentic Irish Pubs and Restaurants." It is

noted that the record also contains a previously submitted letter from Mr. Fagan.

█ states:

My managers have two major areas of responsibility – business administration and community liaison. For the reasons set forth below, the operations of those entities – especially in areas such as Washington, DC that cater to a white-collar work force – requires a baccalaureate degree or its equivalent. . . .

I can readily attest that an Irish Pub and Restaurant in the Washington/Baltimore metropolitan area will founder without managers of the quality of those with four-year degrees. The Irish Pub and Restaurant business in this area is highly competitive. Patrons will simply go to a competitor rather than suffer from the effects of an inferior manager.

The third letter is from █, proprietor of Ireland's Four Provinces pub and restaurant in Washington, D.C. █ indicates that he hires only persons with a bachelor's degree or equivalent in hotel and catering management, or a similar discipline, for his management staff. █ also states that one of his employees is an H-1B food and beverage manager with a bachelor's degree in hotel and catering management. He states further that he has been in the restaurant industry for over 35 years in Washington DC and in Virginia. It is noted that the record also contains a previously submitted letter from █

The comments of these three restaurant proprietors are noted. They, however, do not provide any evidence in support of their statements. They do not rely on industry surveys, data or other documentation to reach the conclusion that the position requires a bachelor's degree in a field related to hospitality/food service management. For example, █ does not specify the requirement of a bachelor's degree in a specific specialty¹ for the restaurant management positions at Jurys Doyle Hotel Group. Nor does he provide any evidence that would establish his authority to speak to the recruiting and hiring practices of "single-business" establishments. In like manner, █ provides no evidence substantiating that he is the proprietor of a restaurant consulting company that specializes in providing the marketing and management consulting related to the establishment of authentic Irish restaurants in the United States and is qualified "to attest to standard professional requirements for authentic Irish Pubs and Restaurants." And finally, although █ states that one of his employees is an H-1B food and beverage manager with a bachelor's degree in hotel and catering management, he also states that he has been in the restaurant industry for over 35 years. As such, to demonstrate that he normally requires a bachelor's degree in hotel and catering management for his restaurant manager positions, he would need to document the credentials of more than just one employee. 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*

¹ A March 19, 2007 search of the Jurys Doyle Hotel Group website at http://www.jurysdoyle.com/careers/current_vacancies.html, finds a "deputy general manager" vacancy at the Jurys Washington Hotel. No requirement of a bachelor's degree is specified. Rather, the "minimum experience required" is "4 – 5 years."

of California, 14 I&N Dec. 190 (Reg. Comm. 1972)). The *Handbook* is a compilation of results of nationwide industry questionnaires, surveys and personal interviews by the DOL, and indicates that there is no specific degree requirement for entry into the field. The AAO 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, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Counsel also submits seven Internet job postings for food service managers or similar positions. There is no evidence, however, to show that the employers issuing those postings are similar to the petitioner, or that the advertised positions are parallel to the instant position. The employers represent a variety of businesses, including a cruise line, hospital, country club, technology institute, and Universal Studios. The petitioner, however, is not similar to these businesses. Further, only two of the seven advertisements stipulate the requirement of a bachelor's degree in a specific specialty. Thus, the advertisements do not establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. The AAO acknowledges counsel's assertion that the individual in the proffered position must have a broad awareness of current events and Irish culture to interact with patrons and that the authors of the three letters submitted also imply that the "front of the house" operations of an Irish restaurant or an independent higher-end restaurant require a more advanced, college-level education and training to properly perform the duties of a manager. The AAO finds, however, that the duties of a manager interacting with patrons or otherwise performing the business operations of an Irish pub/restaurant, are not complex or unique duties, but rather are duties common to the management duties of many restaurants. The petitioner has failed to distinguish the proffered position from that of a position that is routinely performed by non-degreed restaurant managers. The petitioner has, accordingly, failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. On appeal, counsel asserts that although the petitioner is a start-up operation without an extensive hiring history, every permanent manager it has hired has had a four-year degree or its equivalent. Counsel, however, does not submit any evidence in support of this assertion. The petitioner does not provide evidence that the general manager, for example has a degree in a specific discipline or that his experience in the industry is equivalent to a four-year course of study in a specific discipline related to the duties of the position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Neither does the record contain copies of other permanent manager's diplomas or evidence that the referenced employees' degrees are in specific disciplines that relate directly to their positions. Again, 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. at 165. Moreover, 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. 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.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states, on appeal, that the beneficiary's responsibilities, which entail "front of the house," kitchen, and administrative duties, as well as dining and socializing with the patrons, conversing socially with the patrons, and possessing a broad awareness of current events and Irish culture, are so highly complex as to require a bachelor's degree. The information in the record about the proposed duties does not establish that they exceed in scope, specialization, or complexity those usually performed by food service managers, an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. Regarding the proposed duties that relate specifically to knowledge of Irish culture and current events, the petitioner has not demonstrated that these activities elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. It is further noted that, although information on the petitioner reflects that the petitioner has 23 employees and a gross annual income of \$1.5 million, the record does not contain any corroborating evidence in support of these claims, such as quarterly wage reports and federal income tax returns. Once again, 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. at 165.

To the extent that they are depicted in the record, the duties 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. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 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.

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.