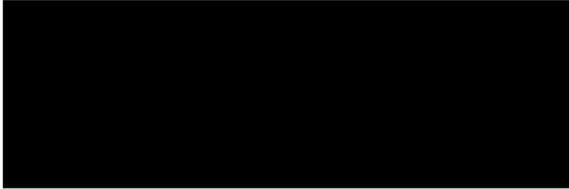


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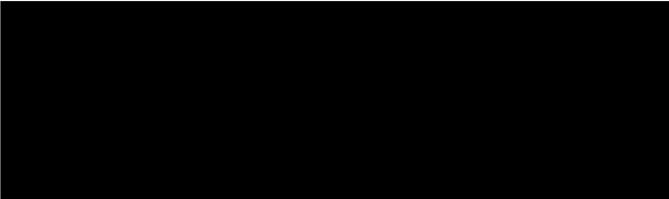
D2

FILE: EAC 04 142 55101 Office: VERMONT SERVICE CENTER Date: JUL 24 2007

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the service center director. Based upon information obtained from the beneficiary during her visa issuance process at the U.S. Embassy, the director determined that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of her intent to revoke approval of the visa petition and her reasons therefore, and ultimately revoked the approval of the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a luxury inn and restaurant that seeks to employ the beneficiary as a full-time “assistant rooms division 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 revoked the approval of the petition because the record does not establish that the beneficiary has been employed as an “assistant rooms division manager” in accordance with the terms and conditions of the approved petition.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director’s request for evidence (RFE); (3) the director’s approval notice; (4) the American Embassy’s recommendation for review and possible revocation of the petition; (5) the director’s notice of intent to revoke; (6) the petitioner’s response to the director’s notice; (7) the director’s decision revoking the petition; and (8) the Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-290B, received by the Service on January 18, 2006, counsel stated:

- a. The change of duties about which the U.S. Consular Officer raised concerns, and which Petitioner agrees occurred, did not require the filing of a new petition and did not justify a revocation of the H-1B approval;
- b. The occasional performance of non-specialty occupation duties by members of the professional and management team at The Inn at Little Washington does not in any way reduce of [sic] eliminate the requirement that individuals serving in positions such as Assistant Rooms Division Manager and Assistant to the General Manager possess a U.S. Bachelor’s Degree, or its equivalent, in hotel or hospitality management; and
- c. The record contains significant evidence of the exclusive nature of the operations of The Inn at Little Washington and proof of the hiring requirements both at The Inn at Little Washington, in particular, and the exclusive segment of the hotel industry, in general.

Counsel checked the block indicating that he would be sending a brief and/or evidence to the AAO within 30 days. The AAO sent a fax to counsel on June 6, 2007, informing counsel that no separate brief and/or evidence was received, to confirm whether or not he had sent anything else in this matter, and as a courtesy, providing him with five days to respond. However, counsel did not respond and no further documents have been received by the AAO to date. As such, the record is considered complete.

The issue before the AAO is whether the beneficiary has been employed as an “assistant rooms division manager” in accordance with the terms and conditions of the approved petition and 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) consistently 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 seeks the beneficiary’s services as a full-time “assistant rooms division manager.” Evidence of the beneficiary’s duties includes: the Form I-129; the petitioner’s April 10, 2004 statement in support of the petition; and counsel’s August 4, 2004 response to the director’s RFE. As stated by the petitioner, the proposed duties are as follows:

[D]irect and oversee the proper and efficient management of hotel rooms division operations to ensure consistently high quality service, high occupancy levels and maximum profitability; establish and implement goals, objectives, staffing guidelines, and quality control standards for hotel rooms division department operations; direct and oversee hotel rooms division operations department employees, including other professional and managerial personnel with respect to day to day management operations, quality control, service standards, and international hospitality standards; and, enforce the procedures and policies of Petitioner.

In response to the director’s RFE, counsel submitted the following proposed duties:

Approximately 90% of time is spent on the following management duties:

- Serve as primary management representative overseeing all aspects of the Inn’s rooms and front office operations to ensure that guest needs are served in an efficient and profitable manner;
- Direct and oversee the Inn’s front office and rooms division management concerning scheduling, training, job performance, performance standards, guest service, promotions, discipline, hiring, and firing;
- Establish and implement objectives and quality standards for the Inn’s rooms division and front office operations including hospitality concepts, pricing, guest service standards, marketing plans, and personnel needs through projections, market analysis and management staff meetings;
- Oversee development of budgets, cost controls, inventory controls, requisitions, and analysis of same;
- Oversee coordination of operations with other department heads at the Inn and other key management personnel. This consists of meetings, preparation of reports and conducting planning sessions designed to increase revenues;

- Analyze hotel and world class inn industry competition and develop guest service concepts to maintain the quality and competitiveness of the Inn's operations; and
- Coordinate The Inn's operations with Relais and Chateaux members throughout the world.

The remaining 10% of time is spent on public relations and community involvement, professional responsibilities in the business community and hotel/luxury inn organizations, team building among Inn employees, and a variety of other management activities.

In her revocation, the director found that the duties of the proffered position as described in the initial petition differ from the duties the beneficiary actually performs, such as waiting tables, serving guests, and cleaning guest rooms. The director concluded that the record does not establish that the beneficiary has been employed as an assistant rooms division manager in accordance with the terms and conditions of the approved petition.

According to the consular officer's report, dated April 29, 2005, at the time of the beneficiary's interview at the U.S. Embassy, Manila on March 9, 2005, she had not taken up the position of Assistant to the General Manager, in accordance with the terms of the employment offer, dated February 23, 2005 and signed by the petitioner's director of human resources and the beneficiary, which reflected a start date of February 28, 2005. The consular officer concluded that, at the time of approval of the petition, the director was not aware of the information revealed during the interview, namely that, in addition to her assistant manager duties, the beneficiary worked as a waitress.

Pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A), a director shall issue a notice of intent to revoke an approved Form I-129 petition if he or she finds that:

- (1) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or
- (2) The statement of facts contained in the petition was not true and correct; or
- (3) The petitioner violated terms and conditions of the approved petition; or
- (4) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or
- (5) The approval of the petition violated paragraph (h) of this section or involved gross error.

The director's notice of intent to revoke and ultimate revocation of approval is based on the criterion at 8 C.F.R. §§ 214.2(h)(11)(iii)(A)(3) and (5). The AAO finds that the director adequately informed the petitioner of the deficiency of the petition and that the approval of the petition violated paragraph (h) of the

regulation at 8 C.F.R. § 214.2 and that the beneficiary would not take up the position as described in the petition. The director notified the petitioner of the adverse information resulting from the beneficiary's interview and provided opportunity for the petitioner to rebut it. The NOIR is sufficient and a review of the record finds that the approval of the petition was in gross error.

The petitioner has not provided evidence that the beneficiary meets any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO turns first 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; 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 Department of Labor's (DOL) *Occupational Outlook Handbook (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)).

The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. Although a review of the *Handbook* finds that lodging managers, in some instances, may qualify as a specialty occupation, the AAO does not concur with the petitioner that the proffered position is a specialty occupation. In this matter, the petitioner is a luxury inn and restaurant. Counsel's assertion on appeal that the beneficiary's occasional performance of non-specialty occupation duties does not eliminate the requirement of a related bachelor's degree, is noted. Noted also is the letter, dated November 17, 2005, from the petitioner's general manager, who states: "As a member of the management team [the beneficiary] is expected to help out wherever necessary. This means that, when we are short staffed, managers will be asked – and are expected – to step into roles and jobs not in their primary job description." The record, however, contains no evidence such as copies of the beneficiary's pay stubs, the petitioner's organizational chart, and/or quarterly wage reports, to show that the beneficiary performs only "occasional" non-specialty occupation duties. As discussed in the consular officer's report, the beneficiary's pay stub for the pay period from December 12, 2004 through January 10, 2005, reflects that the beneficiary worked almost 23 hours out of an approximate total of 87 hours - at least 27% of the pay period - at a rate of \$2.13 per hour, and earned \$260.53 in "Tips – Wait Staff." The evidence of record does not support counsel and the petitioner's claims that such non-specialty occupation duties are only occasional. It is incumbent upon 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 (BIA 1988). 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. *Matter of Ho*, 19 I&N Dec. at 591. 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)).

Regarding parallel positions in the petitioner's industry, the record contains opinions from three experts in the hotel industry. All three writers assert that positions such as the proffered position require a related bachelor's degree. As discussed herein, for the purposes of this proceeding, the descriptions of duties submitted with the initial petition and the RFE, and the information revealed during the beneficiary's interview at the U.S. Embassy, Manila, will be considered. The record does not indicate that the writers have adequate knowledge of this matter. The opinions do not include a discussion of the proposed duties and/or the actual work that the beneficiary would perform within the context of this particular petitioner's business. The writers do not demonstrate knowledge of the petitioner's particular business operations. They do not relate any personal observations of those operations or of the work that the beneficiary would perform. Their opinions do not relate their conclusions to specific, concrete aspects of this petitioner's business operation to demonstrate a sound factual basis for their conclusions about the educational requirements for the particular position at issue. 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). As the opinions of the writers are not based on a factual foundation, the AAO does not find them probative in this matter.

In response to the director's RFE, counsel stated that CIS has already determined that the proffered position is a specialty occupation since CIS has approved other, similar petitions in the past. This record of proceeding does not, however, contain all of the supporting evidence submitted to CIS in the prior cases. In the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions 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 cases were similar to the proffered position or were approved in error, no such determination may be made without review of the original records in their entirety. If the prior petitions were approved based on evidence that was substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petitions would have been erroneous. 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).

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree can perform the work associated with the position. In the instant petition, the petitioner has submitted insufficient documentation to distinguish the proffered position from similar but

non-degreed employment. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

For the reasons discussed above, the petitioner has not satisfied any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (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. The record contains approval notices for three of the petitioner's employees, who are described as the room service manager, housekeeping manager, and hotel pastry coordinator. It is noted that the record does not contain copies of the corresponding petitions. Again, in the absence of all of the corroborating evidence contained in other records of proceeding, the information submitted by counsel is not sufficient to enable the AAO to determine whether the positions offered in the prior cases were similar to the position in the instant petition. Further, regardless of any degree requirement imposed by the petitioner, the evidence of record does not substantiate a need for at least a bachelor's degree in a specific specialty for the proffered position. CIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation, regardless of the petitioner's past hiring practices. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. In this regard, the petitioner fails to establish that the proffered position entails the theoretical and practical application of a body of highly specialized knowledge attained by a bachelor's degree, or the equivalent, in a specific specialty.

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.

The AAO here incorporates its discussion regarding the lack of concrete evidence substantiating the actual duties of the proffered position. As indicated in the discussion above, the record of proceeding contains inconsistencies and lacks evidence of specific duties that would establish such specialization and complexity. 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 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.