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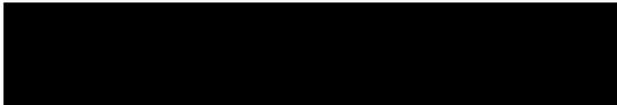
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FILE: EAC 05 211 52325 Office: VERMONT SERVICE CENTER Date: MAR 01 2007

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 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.

In order to employ the beneficiary as a catering director, the petitioner, a restaurant management company, filed this H-1B petition to attain classification of 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 on the basis that the petitioner had failed to establish that the position that is the subject of this petition meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal counsel contends that, contrary to the director's decision, the evidence of record establishes that the proffered position qualifies as a specialty occupation because it requires a college degree in hospitality management or a related field. Counsel asserts that the director's decision is founded upon an erroneous basis, namely, that the proffered position does not qualify as a specialty occupation because of the range of baccalaureate degrees that equip a person to perform the duties of the position.

The director's decision to deny the petition was correct. Accordingly, the appeal will be dismissed and the petition will be denied. The AAO bases its decision upon its consideration of the entire record of proceeding before it, including (1) the petitioner's Form I-129 (Petition for Nonimmigrant Worker) and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, counsel's brief in support of the appeal, and the documents accompanying the brief, including a copy of the petitioner's August 19, 2005 letter of reply to the RFE.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consonant with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] 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 [2] 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.

CIS has consistently interpreted 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. Applying this standard, CIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

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 describes itself as a restaurant management company that was established in 1996, currently employs ten people, and has gross sales in excess of \$700,000. Counsel's August 19, 2005 letter of reply to the RFE asserts that “the position of Catering Director offered by [the petitioner] heavily promotes, markets,

and sells the services of [the petitioner's] Catering Division and thus qualifies as a specialty occupation requiring the services of a person holding at least a baccalaureate degree, or the equivalent, in hospitality management or a related field.”

In its June 30, 2005 letter in support of the petition, the petitioner introduced the proffered position as follows:

As Catering Director, [the beneficiary] will be responsible for directing and overseeing all aspects of the restaurant catering department. Her duties will include managing promotions and sales, developing and implementing marketing strategies targeting professional, social, and international travel group sales; supervising catering and wait staff; developing event budgets and developing catering fee schedules; and coordinating with clients to develop menus, décor, and event themes.

In its August 11, 2005 letter in response to the RFE, the petitioner provided the following description of the duties proposed for beneficiary:

As Catering Director, [the beneficiary] will be responsible for directing and overseeing all aspects of the restaurant catering department, focusing at least 80% of her time on the sales and promotions aspects of his business. Her duties will include the following:

- Managing sales activities and promotions programs (20%).
- Managing, developing, and maintaining customer and contact base (20%).
- Developing and implementing promotions and advertisements (15%).
- Developing and implementing marketing strategies targeting professional, social, and international travel group sales (10%).
- Monitoring economic, business, and hospitality industry trends to develop department policies and goals (10%).
- Reviewing and analyzing cost, pricing, and profit and other financial data to design prices, develop fee schedules, and determine event budgets (5%).
- Supervising catering and wait staff (5%).
- Preparing monthly reports and developing strategies to increase departmental efficiency and profitability (5%).
- Overseeing quality control process and ensur[ing] that quality standards are met (5%).
- Coordinating with clients to develop menus, venues, event themes, and décor (5%).

The petitioner has identified multiple duties, but, as evident in the list above, they are described in exclusively generic terms. The record's information about the position and its proposed duties consists of broad functions – such as “managing sales activity”; “managing, developing and maintaining customer and contact base”; and “developing and implementing promotions and advertisements” - that do not establish what they would involve in actual performance in the context of the petitioner's business. There are no descriptions of specific tasks that the beneficiary would perform, and neither documentary evidence nor concrete descriptions of any

of the matters upon which the beneficiary would work. Consequently, the record does not convey indicia of uniqueness, specialization, or complexity of the position as compared with other catering director positions.

The petitioner asserts that over 80% of the Catering Director's time is devoted to activities related to sales and promotions management, and that CIS should recognize the position as belonging to the "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" occupation as discussed in the *Handbook* and the sales manager occupation as discussed in *O*NET Online*.

Documentary evidence submitted to support the proffered position as being a specialty occupation includes copies of: (1) 2004-2005 edition of the Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* sections on "Advertising, Marketing, Promotions, Public Relations, and Sales Managers" Professional and Related Occupations"; (2) the Summary Report on Sales Managers at DOL's *O*NET (Occupational Information Network) Online*; and (3) Internet advertisements placed by employers other than the petitioner.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

As the AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses, the AAO consulted the 2006-2007 edition of the *Handbook* for information relevant to the proffered position and its duties.¹ The relevant section of the *Handbook* (at pages 27-29) indicates that a bachelor's degree, or the equivalent, in a specific specialty is not a normal minimum hiring requirement for advertising, marketing, promotions, public relations, or sales managers. Likewise, reference to *O*NET Online's OnLine Help* Internet site, at <http://online.onetcenter.org/help/>, reveals the following about the *O*NET Online* information about sales managers. The Job Zone Four designation places the sales manager occupation in a group of which "most" require "a four-year bachelor's degree" but "some do not." The SVP (Specific Vocational Preparation) code of 7 assigned to sales managers indicates a need for "[o]ver 2 years up to and including 4 years" of vocational training within this context:

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

The *O*NET* does not indicate whether a baccalaureate or higher degree in a specific specialty is a minimum for entry into the type of position proffered here, and it does not rebut the *Handbook's* information that such positions do not normally require a degree in a specific specialty.

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at www.stats.bls.gov/oco/. The AAO's references are to the 2006-2007 print edition of the *Handbook*.

The AAO also considered the *Handbook* section on the Food Service Manager occupation (pages 46-48) and the *O*NET Online* Summary Report for that occupation, as some of the proposed duties comport with some aspects of this occupation.² However, the *Handbook* indicates that a bachelor's degree in a specific specialty is not a normal minimum hiring requirement for this occupation, and the Job Zone (Three) and SVP (6.0 to < 7.0) ratings that *O*NET Online* assigns to this occupation are lower than those assigned to the sales manger occupation.

For the reasons discussed above, the petitioner has not satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The first alternative prong requires the petitioner to establish that the specialized degree requirement is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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)).

As discussed above, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for a bachelor's degree in a specific specialty. There are no submissions from professional associations in the petitioner's industry.

The job advertisements in the record have no significant evidentiary weight. Their array of degree requirements supports the *Handbook's* information to the effect that there is no industry-wide educational standard for recruiting and hiring for the type of position that is the subject of this petition. Of the 12 advertisements, seven specify a bachelor's degree requirement that is unrestricted as to major or academic concentration, and two of these cite "equivalent experience" as acceptable, without identifying an objective framework by which equivalency would be judged. One advertisement specifies a college degree "in Business with emphasis on Marketing." One advertisement specifies as "preferred" a bachelor's degree "with a focus on hospitality or restaurant management, business or related field." The advertisements for the Harvard University Catering Event Manager and the University of Connecticut Catering Manager specify a bachelor's degree "in the Hospitality or Culinary fields, or an equivalent combination of education and experience," without identifying an objective framework by which equivalency would be judged. Further, the evidence of record does not establish that the petitioner's operations and the attendant duties of the proffered position approximate the scale and complexity of

² *O*NET Online* includes Catering Manager among the samples of titles that the food service industry assigns to food service managers.

the two universities' catering operations as indicated in their advertisements. Accordingly, the record does not establish that the universities are advertising for positions that are parallel to the one proffered here.

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides a petitioner the opportunity to show that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty. As reflected in the earlier discussion of the generalized character of the descriptions of the duties that comprise the proffered position, the evidence of record does not demonstrate that the catering director's work would be unique from or more complex than that performed in the general range of positions within the advertising, marketing, promotions, public relations, and sales manager occupations. The *Handbook* indicates that a baccalaureate or higher degree in a specialty is not normally a requirement for positions in these occupations.

The evidence of record does not demonstrate that the work of the petitioner's catering director would be unique from or more complex than that performed in the general range of positions within the occupations discussed in the *Handbook* as advertising, marketing, promotions, public relations, and sales managers, and the *Handbook* indicates that a baccalaureate or higher degree in a specialty is not normally a requirement for positions in these occupations.

The criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) has not been established, as the petitioner has not presented evidence to demonstrate that it has a history of normally requiring at least a baccalaureate degree or its equivalent in a specific specialty.

Counsel's assertion on appeal that that the petitioner "confirmed that it normally requires a baccalaureate degree, or the equivalent, in hospitality management, or a related field, for the position" is incorrect. First, contrary to counsel's assertion, the petitioner has not identified the majors or academic concentrations of the degrees of the two persons that have performed the duties of the proffered position: the petitioner states only they "possessed four-year college degrees." The petitioner's later statement that the "company has found" that the position requires a degree in hospitality management or a related field does not convey when the finding was made or acted upon. Second, there is no confirmation of degree requirements, as the record does not contain documentary evidence to establish whatever degrees or degree-equivalencies are asserted. 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)). Further, neither this nor any unsubstantiated statements of counsel are evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The AAO also notes that the limited evidence in the record about the proffered position and its duties does not establish that any specialty degree requirement that the petitioner may have imposed is necessitated by the position's performance requirements. CIS must examine the evidence of actual employment of the alien to determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*. 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.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. As reflected in this decision's earlier comments on the limitations of the petitioner's information about the proposed duties, the record does not convey the proposed duties in terms specific enough to establish the requisite level of specialization and complexity. The record does not establish the proposed duties as exceeding those of the advertising, marketing, promotions, public relations, and sales manager occupations as described in the *Handbook*. Neither the *Handbook* nor any evidence of record establishes a usual association between such duties and the requirement for at least a bachelor's degree in a specific specialty.

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

Beyond the decision of the director, it is noted that the petitioner has not established that, in accordance with 8 C.F.R. §§ 214.2(h)(4)(iii)(C) and (D), the beneficiary is qualified to serve in a specialty occupation that requires a bachelor's degree in hospitality management or a related field. For this reason also, the petition must be denied. The educational equivalency evaluation upon which the petitioner relies depends partly upon an assessment of the beneficiary's work experience. However, there is no evidence that the evaluator is an official authorized by a U.S. college or university to grant college-level credit for training or experience, as required by 8 C.F.R. §§ 214.2(h)(4)(iii)(D)(1). Furthermore, the two-paragraph Certificate regarding the beneficiary's experience at the Creative Union of Artists is an insufficient factual basis for the evaluator's unexplained conclusion that the beneficiary's "responsibilities throughout her career are indicative of university level training in Hospitality Management and related areas." Furthermore, the evaluator's recitation of the beneficiary's duties exceeds the information contained in the aforementioned Certificate, which is apparently the document on which the evaluator depended for his determination on the beneficiary's experience.

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. Accordingly, the appeal will be dismissed.

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