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Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: SRC 03 071 51183 Office: TEXAS SERVICE CENTER Date: APR 09 2004

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a food services company that seeks to employ the beneficiary as a marketing and operations manager. The petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

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

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a marketing and operations manager. Evidence of the beneficiary's duties includes: the I-129 petition; the petitioner's January 8, 2003 letter in support of the

petition; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part: supervising and coordinating all planning, developing, marketing and food preparation for outside location catered events and banquets; training, supervising and coordinating activities of chefs and other kitchen workers engaged in preparing and cooking foods in the restaurant and catering service; hiring and discharging employees; devising and developing specialty foods recipes; planning menus; analyzing receipts and determining labor and overhead costs; estimating food consumption and assigning prices to menu items; establishing and enforcing nutrition and sanitation standards for the restaurant and catering services; analyzing and developing advertising materials; identifying competitors and potential customers to determine demand for future services and locations; enhancing customer care standards and overall profitability of the company; and developing pricing strategies to maximize profits. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in restaurant management.

The director found that the proffered position was not a specialty occupation because the job is a restaurant manager. Citing to the Department of Labor's *Occupational Outlook Handbook* (*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 found further 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 that the director did not take into account the marketing elements of the position, and incorrectly considered the job as restaurant management instead of operations management. According to counsel, the proffered position is a "Job Zone 4" occupation (referring to the Department of Labor's *O*Net*), which requires a degree. Counsel states further that the Department of Labor (referring to the *Dictionary of Occupational Titles* or *DOT)* assigns the position an SVP rating of 7 to 8, which, according to counsel, requires a degree to enter into the position. Finally, counsel states, in part, that two expert opinions from university professors support his assertion that the position requires a degree.

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 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 *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.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

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 that of an operations manager; it is a food service manager combined with a marketing manager. A review of the Food Service Manager job description in the *Handbook* confirms the accuracy of the director's assessment to the effect that the job duties parallel those responsibilities. In addition, the position includes elements of a marketing manager. No

evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty, is required for either a food service manager or a marketing manager.

Counsel's reference to and assertions about the relevance of information from *O*Net* and the *DOT* are not persuasive. Neither the *DOT's* 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.

The petitioner did not submit any evidence regarding parallel positions in the petitioner's industry.

The record does include evidence from the Texas Restaurant Association regarding an industry standard. The information parallels that in the *Handbook*, which indicates that a four-year degree is *not* required for entry into the position. On appeal, counsel submitted letters from two university professors stating that the position requires a bachelor's degree. The professors state that the skills required for the position are "often taught" in courses in restaurant management or business administration. Citizenship and Immigration Services may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). In this case, the opinions contradict those of the Texas Restaurant Association, as well as the *Handbook*, and so they are given little weight. The record does not include any documentation to support the complexity or uniqueness of the proffered position. The petitioner has, thus, not established the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*) or (*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. In the response to the director's request for evidence, counsel stated, "[T]he employer normally requires a degree or its equivalent for the position," but then goes on to state, "This is a new position." Counsel further states, "[The petitioner] has not hired an individual with less than a Bachelor's Degree for the position of Marketing & Operations Manager." Since the proffered position is a new position, the petitioner cannot possibly establish that it normally requires a degree for a position no one has ever filled before. The petitioner has not met its burden of proof in this regard.

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

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.