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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: WAC 03 105 50085 Office: CALIFORNIA SERVICE CENTER Date: JAN 03 2005

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.

Elizabeth O'Brien

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the California 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 residential care facility for the elderly, authorized by the State of California to serve up to six non-ambulatory patients. It seeks to hire the beneficiary as a food services manager. The director denied the petition because he concluded the petitioner had failed to establish that its position qualified as a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) the Form I-290B, with a brief and new evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is the determination of whether the petitioner's 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 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:

> 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 has asserted that it is seeking the beneficiary's services as a food services manager. Evidence of the beneficiary's duties includes: the Form I-129; a February 12, 2003 support letter from the petitioner accompanying the Form I-129; and counsel's September 24, 2003 response to the director's request for evidence.

In its February 12, 2003 letter, the petitioner stated the beneficiary would manage and coordinate food services, and plan and develop menus and recipes. The duties outlined by the petitioner in its support letter were reiterated by counsel in his September 24, 2003 response to the director's request for evidence, and specified that the beneficiary would:

- Oversee preparation of daily meals and snacks to meet special nutritional and dietary needs for each of the guests;
- Develop and implement individual schedules and meal plans for each guest based on his or her own personal needs;
- Analyze and estimate average food and beverage consumption in order to requisition and replenish weekly food and kitchen supplies as necessary; and
- Monitor and review the food/beverage budget to ensure efficient operation and to ensure expenditures stay within overall budget parameters.

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

The petitioner has stated that the duties of the proffered position are those of a food services manager. Following a review of food service occupations in the 2004-2005 edition of the *Handbook*, the AAO also concludes that the proffered position is most closely aligned to the occupation of food service manager:

> 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, 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....
>
> Managers...estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies....
>
> In addition to their regular duties, food service managers perform a variety of administrative assignments....

The *Handbook* also comments on the educational or training background required of those individuals who wish to work as food service managers:

> Most food service management companies and national or regional restaurant chains recruit management trainees from 2- to 4-year college hospitality management programs. 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 interest and aptitude. Some 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.

In his response to the director's request for additional evidence, counsel contended that the proffered position is a specialty occupation because the primary occupational requirement for entry into the position is a baccalaureate or higher degree, or its equivalent. In support of his position, he notes that the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* assigns the occupation of food services manager an SVP rating of 7. Counsel further states that the DOL's Occupational Employment Statistics program equates an SVP rating of 7 with a job zone rating of 4, a rating that is assigned to those occupations that usually

require a bachelor's degree. On appeal, counsel again raises the DOL ratings assigned to the occupation of food services manager as proof that the petitioner's position qualifies as a specialty occupation.

However, the *DOT* is not a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. It provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require. Further, a job zone rating of 4 does not indicate that a bachelor's degree in a specific specialty is required.

Based on its determination that the proffered position is closely aligned to that of a food service manager, as described by the *Handbook*, and that the *Handbook* states that entry level jobs for food service manager may be filled by applicants with degrees from two-year or four-year college management programs or who have experience, the AAO concludes that the petitioner has failed to establish that its position qualifies under the first criterion – that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

To determine whether the petitioner's position may be able to meet the second criterion – that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty – the AAO has reviewed the Internet job postings submitted by counsel in response to the director's request for evidence and considered counsel's statements in his response to the director's request for evidence and on appeal. The submitted evidence does not, however, establish that a baccalaureate or higher degree requirement is an industry norm for food service managers.

In response to the director's request for evidence, counsel asserted that a baccalaureate degree is a common requirement for food service managers in similar and parallel positions. In support of his assertions, he submitted copies of three Internet job postings for food service managers. However, the AAO's review of the announcements finds that they reflect the employment needs of much larger organizations – a hospital, a food services provider and a retirement community—and do not offer employment that appears parallel to that described by the petitioner. Therefore, they cannot serve as evidence that a degree requirement is common to the petitioner's industry.

Counsel contends that CIS misinterprets the second criterion by requiring a petitioner to establish a degree requirement among similar types of organizations, with similar numbers of employees and income. Citing both *Matter of General Atomic Company,* 17 I&N Dec. 532 (Comm. 1980) and *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Calif. 1989) counsel asserts that the size or the type of business has no relationship to the need for a professional, that the regulatory requirement that a degree be common to the industry relates only to establishing that such a degree is a prerequisite for entry into the profession.

The AAO does not find counsel's interpretation of the second criterion's requirements to be persuasive. The findings in *Matter of General Atomic Company* focused on whether an individual with an undergraduate degree in civil engineering qualified as a person of distinguished merit and ability. In *Young China Daily v. Chappell*, the court concluded that the former Immigration and Naturalization Service (INS) had failed to consider the specific responsibilities of a graphic designer position and, therefore, erred in determining that the position did not require a professional. These findings do not address the requirements of the criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A)*(2)*, which allow a petitioner the opportunity to establish a position as a specialty occupation by providing evidence that a specific degree requirement is the norm within its own industry. Despite counsel's assertions, a petitioner seeking to qualify its position as a specialty occupation under the second criterion must establish that a degree requirement is common to its industry, specifically in parallel positions among similar organizations. CIS' reliance on the alternative requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)*(2)* to evaluate whether a position qualifies as a specialty occupation is confirmed by the findings of *Shanti v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

To determine a petitioner's ability to meet the third criterion, the AAO normally 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. In this case, the proffered position is new. Thus, the petitioner cannot establish that it normally requires a degree or its equivalent for the position.

In assessing whether the petitioner has met its burden with regard to the fourth criterion, the AAO has, again, reviewed the duties of the proffered position, as described by the petitioner at the time of filing and by counsel in response to the director's request for evidence. Although counsel has asserted that the duties of the position are both specialized and complex, his statements do not constitute evidence. Without documentary evidence as support, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). As there is nothing in the record to indicate that the duties of the proffered position are more specialized or complex than those associated with the occupation of food service manager as described in the *Handbook*, the AAO concludes that the position does not meet the requirements of the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner, for the reasons related in the preceding discussion, has failed to establish that its proffered position is a specialty occupation under any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.