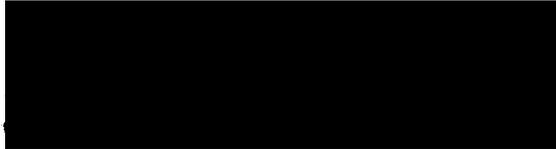


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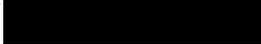
U.S. Citizenship
and Immigration
Services

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DZ

FILE: SRC 04 020 50677 Office: TEXAS SERVICE CENTER Date: **AUG 11 2005**

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, Director
Administrative Appeals Office

DISCUSSION: The 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 full service restaurant that seeks to employ the beneficiary as a general and operations 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 on the basis that the petitioner had failed to establish that the proposed position meets the definition of a specialty occupation as set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

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 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 proposed position.

In determining whether a proposed position qualifies as a specialty occupation, CIS does not rely simply upon the position’s title. The specific duties of the proposed 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 beneficiary and make a determination as to whether the proposed position in fact qualifies for classification 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 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 petitioner's RFE response and supporting documentation; (4) the director's denial letter; and (5) the Form I-290B and appellate brief. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner proposes to hire the beneficiary as a general and operations manager. The Form I-129 described the duties of the proposed position as follows:

Plan and direct the operations of the restaurant. Duties and responsibilities include formulating policies, managing daily operations to include all ordering and pricing of food inventory, menu planning, personnel hiring and scheduling, kitchen management[,] and customer service.

The petitioner offered a more detailed description of the duties of the proposed position in the RFE response:

- Supervise daily preparation of food and maintain food standards;
- Supervise opening and closing of restaurant to public and maintain hygiene standards;
- Dealing with customers who are unhappy with the food/service;
- Maintain records of disputes/problems and take steps to rectify them [sic];
- Maintain inventory and order supplies as and when needed;
- Maintain human resources and plan their use;
- Maintain a productive and motivated work environment;
- Formulate and implement business policies;
- Manage business accounts and maintain records sales and expenditure;
- Formulate and implement marketing strategies to increase sales and revenue;
- Prepare performance and sales reports bi-weekly and review them with the [o]wner;
- Actively seek to develop and expand the business.

The director denied the petition, finding that the petitioner had satisfied none of the four criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

On appeal, counsel contends that the director erred in denying the petition, and that the proposed position is in fact a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

The *Handbook* sets forth the following information regarding the duties of food service managers:

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, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, 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, including recruiting new employees and monitoring employee performance and training.

In that the duties of a food service manager as discussed in the *Handbook* are closely aligned to those of the proposed position as set forth in the petition, the AAO next turns to the *Handbook's* discussion of the educational qualifications required for entry into the field.

Most food service management companies and national or regional restaurant chains recruit management trainees from 2- and 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. Executive chefs need extensive experience working as chefs, and general managers need prior restaurant experience, usually as assistant managers.

A bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation. A number of colleges and universities offer 4-year programs in restaurant and hotel management or institutional food service management. For 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. Both 2- and 4-year programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. Some programs combine classroom and laboratory study with internships providing on-the-job experience. In addition, many educational institutions offer culinary programs in food preparation. Such training can lead to a career as a cook or chef and provide a foundation for advancement to an executive chef position.

These findings do not support counsel's contention that a bachelor's degree is required for entry into the field. The *Handbook* explains unequivocally that a bachelor's degree is not the normal minimum requirement for entry into the field, and its findings do not support the assertion that a bachelor's degree is required for entry. The statement that a bachelor's degree provides "particularly strong preparation" for a position or that some employers "prefer" to hire candidates with such a degree does not rise to the "normally required" standard imposed by the regulation. The *Handbook* specifically notes that two-year degrees, and sometimes even previous experience with no degree at all, may be acceptable.

Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

Nor does the proposed position qualify as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this criterion requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the job postings submitted by counsel in response to the director's RFE. Counsel contends that these job postings establish the petitioner's degree requirement as an industry standard. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations.

None of the job postings submitted by counsel contain a bachelor's degree requirement. The posting from Yum! Brands (for work at a Long John Silver's restaurant) does not require a bachelor's degree. At the section of the posting entitled "Degrees Required," the only listed requirement is "High School." Nor does the first posting from Careers.com have a bachelor's degree requirement – it specifically states that a "2 or 4 year college degree is required." Therefore, an associate's degree would suffice. Similarly, the second posting from Careers.com has the following qualification: "High School required. College a plus." Finally, the Black-Eyed Pea Restaurant posting requires the following: "[p]revious experience in restaurant management is required along with high school diploma or degree in restaurant management."

None of these postings stand for the proposition claimed by counsel. The fact that some employers "prefer" a bachelor's degree or that others consider such a degree "a plus" does not equate to a requirement. Therefore, the petitioner has not established its degree requirement as an industry standard.

Thus, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO also concludes that the record does not establish that the proposed position is a specialty occupation under the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which requires a showing that the position is so complex or unique that it can only be performed by an individual with a degree. It finds no evidence that would support such a finding, as the position proposed in the petition is nearly identical to the food service manager position described in the *Handbook*, which does not require a degree.

Accordingly, the petitioner cannot establish its proposed position as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO next turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires that the petitioner demonstrate that it normally requires a degree or its equivalent for the position. 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 the names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees' diplomas.

The submitted evidence fails to meet the third criterion. In the appellate brief, counsel contends that the proposed position qualifies under this criterion because the president of the petitioning company "has stated that he will not hire anyone who does not hold a college degree for this position as his experience indicates that only a college graduate will be able to handle the job." However, in the absence of supporting documentation, such as employee records indicating that others in this position have held a degree in a specialty, this statement by the petitioner does not establish that the petitioner normally

requires a degree or its equivalent for the position. Simply 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)).

Moreover, the employer's own admission that it has previously employed individuals without degrees in the past for the position excludes the proposed position from classification under this criterion. The regulatory requirement is not whether the petitioner wishes to hire persons with degrees "from this point forward," but rather whether the petitioner "normally requires" individuals holding the position to possess a degree.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. 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 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.¹ To interpret the regulations in 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.

Therefore, the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) has not been satisfied.

The fourth criterion, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), requires the petitioner to establish that the nature of the proposed position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree in the specialty occupation. A review of the duties of the proposed position does not lead to a conclusion that they would require the beneficiary to possess a higher degree of knowledge and skill than that normally expected of food service managers in other, similar organizations.

Thus, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The proposed position does not qualify for classification as a specialty occupation under any of the four criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). Accordingly, the AAO will 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.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.