

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

52

FILE: WAC 08 142 52039 OFFICE: CALIFORNIA SERVICE CENTER DATE: **JAN 14 2010**

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, 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 restaurant that was established in 2002 and has 23 employees. It seeks permission to employ the beneficiary as a general manager of its restaurant operations and, 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, finding that the proposed position was not a specialty occupation. On appeal, counsel submits a brief and letters from four Thai restaurant owners who attest that their general managers all hold a bachelor's degree in business or hospitality management.

The record includes: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; and; (5) the Form I-290B, along with documentation submitted in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

When filing the H-1B petition, the petitioner submitted a letter that described the position it was offering to the beneficiary. The letter listed the following specific responsibilities for the general manager position:

- Interpreting and explaining company policies and organizational structure to new employees;
- Maintaining compliance with the health and sanitation regulations and codes of the State of Washington;
- Maintaining compliance with the State beverage and liquor laws and regulations;
- Presenting creative and innovative venues in the food area to keep the restaurant viable and competitive with other existing restaurants in the area;
- Overseeing the general public/curbside appearance of the facility and insuring its cleanliness and attractiveness on a daily basis;
- Monitoring the maintenance and repair needs as well as security of the restaurant facility;
- Insuring the training and development of all staff by scheduling workshops and in-service training in their specific areas;
- Scheduling general meeting[s] for all staff;
- Keeping abreast with the development and progress of the staff; [and]
- Investigating and resolving employees['] complaints and problems[.]

In a June 12, 2008 RFE, the director asked the petitioner to submit additional evidence relating to the proffered position such as: evidence that similar organizations require their general managers to have a bachelor's degree, or its equivalent, in a specific specialty; documentation, if available, to show that an industry-related professional association has made a degree in a specific specialty a requirement for entry into the position; and letters or affidavits from firms or individuals in the petitioner's industry that attest that such firms routinely employ and recruit only degreed individuals in a specific specialty.

In response, counsel submitted a letter stating that information in both the *Dictionary of Occupational Titles (DOT)* and the *Occupational Outlook Handbook (Handbook)* supported a conclusion that the proffered position requires a bachelor's degree. Counsel stated that the petitioner's plans to expand its operations (it had three locations already) coupled with its status as a "higher-end" restaurant necessitated the hiring of an individual who possessed a bachelor's degree because only such an individual could handle the duties and responsibilities associated with the petitioner's growth and expansion. Counsel stated that the petitioner had not hired anyone in this position in the past, but that the nature of the proposed duties was so specialized, complex, and unique that the knowledge needed to perform them required the incumbent to possess a bachelor's degree.

On October 8, 2008 the director denied the petition. The director concluded that the position does not require the incumbent to hold a bachelor's degree in a specific specialty, noting that a variety of educational and work experience backgrounds could qualify someone as a restaurant manager. The director also did not concur with the petitioner that the duties were so complex, unique or specialized to require a bachelor's degree. The director assessed each eligibility criterion listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) and found that the position could not qualify as a specialty occupation.

On appeal, counsel disagrees with the director's findings. Counsel argues that, regarding the first criterion at C.F.R. § 214.2(h)(4)(iii)(A), the petitioner is only required to establish that a bachelor's degree or its equivalent is a minimum requirement for entry into the occupation, not that the degree must be in a specific specialty. Counsel claims that requiring the degree to be in a specific specialty puts an undue burden on the petitioner which is not supported by the regulatory language. Counsel also states that the duties are complex, unique and specialized given the petitioner's plans to expand its operations, which involve coordination among the petitioner's several restaurants. The petitioner submits four letters from owners of Thai restaurants, each of whom attests that its general manager holds a bachelor's degree in business or hospitality management.

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.

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.

Consistent 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R.

§ 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently 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. Applying this standard, USCIS 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, USCIS 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. USCIS must examine the ultimate employment of the alien, to determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384.

The AAO routinely consults the *Handbook*¹ for its information about the duties and educational requirements of particular occupations. The AAO concurs with the director that the position is akin to a restaurant or food service manager. With duties that include maintaining compliance with health regulations, scheduling staff meetings, and explaining company policies to new employees, the position is no more unique or complex than a typical restaurant managerial position.

The *Handbook's* information on educational requirements in the restaurant or food service occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category. Instead, most individuals working in this occupation have prior work experience in the food service industry and not necessarily a bachelor's degree. Counsel on appeal states that the director put an undue burden on the petitioner by requiring the bachelor's degree to be a specific specialty, as the regulations do not contain such a requirement. The AAO disagrees. As stated previously, USCIS consistently 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. Thus, the proposed position does not qualify for classification as a specialty occupation under the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), that a baccalaureate or higher degree, or its equivalent in a specific specialty, is normally the minimum requirement for entry into the position.

The AAO now turns to a consideration of whether the petitioner, unable to establish its proposed position as a specialty occupation under the first criterion set forth at 8 C.F.R. § 214.2(h)(iii)(A), may qualify it under one of the three remaining criteria: a degree requirement as the norm within the petitioner's industry or the position is so complex or unique that it may be performed only by an individual with a degree; the petitioner normally requires a degree or its equivalent for the position;

¹ *Occupational Outlook Handbook*, 2008-2009 ed., available at <http://www.bls.gov/oco/ocos086.htm> (accessed December 29, 2009).

or the duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with a baccalaureate or higher degree.

The proposed position does not 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 regulation requires a demonstration that a specific degree requirement is common to the industry in parallel positions among similar organizations. To meet the burden of proof under this prong imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among similar organizations. In determining whether there is such a common degree requirement, factors often considered by USCIS 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 noted previously, the *Handbook* does not report that the industry normally requires a bachelor's degree as a minimum qualification. The petitioner also has not submitted any evidence that the industry's professional associations have made a degree a minimum requirement for entry. Regarding businesses similar to the petitioner, the petitioner submits on appeal four letters from owners of Thai restaurants, each of whom states that its general manager holds a bachelor's degree. The AAO notes not only that the text of every letter is identical, but also that not all owners specify the particular specialty of the general manager's bachelor's degree. Furthermore, none of the owners provides documentary evidence, in the form of a copy of each manager's bachelor's degree, to substantiate the assertions in each letter. 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)). Therefore, the petitioner has failed to establish that a degree requirement is an industry standard, and therefore has not satisfied the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. No aspect of the proffered position's duties is particularly unique; the duties involve routine oversight tasks that are inherent in most supervisory or managerial positions in a restaurant environment. The petitioner, therefore, has not established that the proposed position qualifies for classification 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 the petitioner to 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. Here, the petitioner does not have a prior hiring practice to review. Therefore, the proposed position does not qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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. A review of the beneficiary's duties reveals no task that involves any sophisticated responsibilities. Rather, the duties are generic managerial and supervisory responsibilities that are inherent to a restaurant managerial position. Regarding the claim that the position is complex because of the petitioner's expansion plans, the AAO notes that the petitioner has not presented any evidence of such plans. Again, 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)). As a result, the record fails to establish that the proposed position meets the specialized and complex threshold at 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 criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4), and this petition was properly denied.

Pursuant to section 291 of the Immigration and Nationality Act, 8 U.S.C. § 1361, the burden of proof is upon the petitioner to establish eligibility for the benefit it is seeking. Here, the petitioner has not met its burden. Accordingly, the AAO affirms the director's decision to deny the petition and dismisses the appeal.

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