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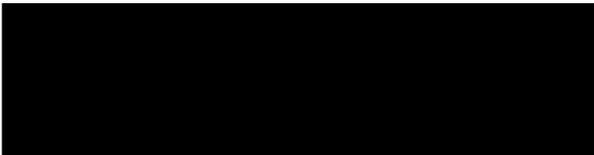
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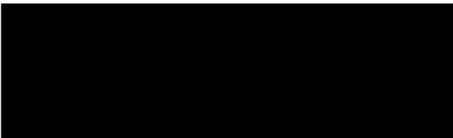


FILE: EAC 06 156 50437 Office: VERMONT SERVICE CENTER Date: DEC 11 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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, Vermont 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 owns and operates two Subway sandwich shops and a Captain Shrimp quick service restaurant. The petitioner states it employs 18 personnel, has an estimated \$1.5 million in gross annual income, and has an estimated \$90,000 in net annual income. It seeks to employ the beneficiary as a general manager. Accordingly, 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 record of proceeding before the AAO contains: (1) the Form I-129 filed April 19, 2006 and supporting documentation; (2) the director's August 2, 2006 request for evidence (RFE); (3) counsel for the petitioner's September 8, 2006 response to the director's RFE and supporting documentation; (4) the director's October 11, 2006 denial letter; and (5) the Form I-290B and counsel's statement on appeal and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

On October 11, 2006, the director denied the petition determining that the petitioner had failed to establish that the proffered position required a four-year degree as the minimum qualification for entry into the position or that the position is so complex, specialized, or unique as to require a four-year degree or its equivalent. The director also determined that the petitioner had not established that the beneficiary is qualified to perform services as a general manager in a food/culinary services specialty occupation.

On appeal, counsel for the petitioner asserts that the evidence submitted, including a revised experience evaluation, shows the beneficiary is qualified to perform the duties of the position. Counsel does not address the director's indirect determination that the proffered position is not a specialty occupation.

Although counsel for the petitioner does not directly address the issue of whether the duties of the position comprise a specialty occupation, the AAO will more thoroughly discuss this essential element for H-1B classification. To establish a position as a specialty occupation, 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 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.

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 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.

In the April 11, 2006 letter appended to the petition, the petitioner identified the proffered position as a general manager of the petitioner's two Subway sandwich shops and a newly developed quick service restaurant. The petitioner stated that the beneficiary as general manager:

Will be required to direct and coordinate activities concerned with pricing and sales of products for our three restaurants. She will manage staff, prepare work schedules and assign specific duties. Additionally, [the beneficiary] will review financial statements, sales and activity reports, and other performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement. She will determine staffing requirements, and interview, hire and train new employees.

The petitioner noted:

In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently and achieving quality in food preparation and service, the beneficiary will be responsible for a number of administrative and human resources tasks, foremost being to carefully find and evaluate new ways of recruiting employees in a tight job market and finding creative ways to retain experienced workers.

The petitioner indicated that the proffered position required "the functional equivalent of a four-year United States Bachelor's degree in Hospitality Management or related field and some experience in restaurant management."

- In response to the director's RFE, the petitioner added that the beneficiary: "establishes and implements company policies, goals, objectives, and procedures, conferring with staff members as necessary;" "directs and coordinates the company's financial and budget activities to fund operations and increase efficiency;" and "manages the movement of inventory into and out of the company."

In addition to the descriptions of the duties of the proffered position, the record before the director included copies of several job announcements for positions including: (1) a general manager for an international airline catering company that lists an educational level as "bachelor's degree," but does not specify if a degree is preferred or required; (2) a general manager-restaurant and assistant manager for a restaurant group that requires a high school degree or GED is preferred; (3) a general manager-restaurant for a bakery at Disney that indicates a one-year certificate from college or technical school or three to six months related experience and/or training, or equivalent combination of education and experience will qualify an applicant; (4) a general manager for a contract food service and hospitality provider that prefers a bachelor's degree in food service, nutrition, or related field and requires an associate's degree in food service management or culinary arts; (5) a general manager for a catering and events organization that prefers a bachelor's degree or higher; (6) a restaurant manager for the Waldorf Astoria that requires a college degree; and (7) a general manager for Boston Market that requires at least three years of experience as a restaurant/retail general manager and prefers a bachelor's degree.

The petitioner also included an excerpt from the Department of Labor's *O*NET Online (O*NET)* for general and operations managers and a copy of the petitioner's website indicating the petitioner was looking for franchisees for its Captain Shrimp restaurant. The petitioner also submitted an August 23, 2006 position evaluation prepared by [REDACTED] an assistant professor of hospitality and service management at the Rochester Institute of Technology. Professor [REDACTED] opined: "[c]ompanies seeking to employ a General Manager require prospective candidates to possess at least [a] Bachelor's degree in the area of Hospitality Management, or a related field from an accredited institution of higher learning." Professor [REDACTED] recited the petitioner's initial description of duties of the proffered position and concluded that the duties are: "highly business-oriented and require skills in Hospitality Management, and other related areas. Skills in these areas can be acquired only through Bachelor's-level classes in these areas, which are part of a Bachelor's degree program in Hospitality Management, or through extensive work experience in the field of Hospitality Management at an advanced level."

On appeal, counsel for the petitioner submits excerpts from a School of Management detailing a juris doctorate and master of business administration joint degree and copies of three general manager positions that had been filled by individuals with juris doctorate degrees.

To determine whether the proffered position is a specialty occupation, the AAO turns first to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational

requirements of particular occupations. The description of the duties of the proffered position is most similar to the *Handbook's* discussion 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 limited-service eating places, such as sandwich shops, coffee bars, or fast-food establishments, managers, not executive chefs, are responsible for supervising routine food preparation operations.

Managers or executive chefs analyze the recipes of the dishes to determine food, labor, and overhead costs and to assign prices to various dishes.

Managers interview, hire, train, and when necessary, fire employees. . . . They schedule work hours. . . . In addition to their regular duties, food service managers perform a variety of administrative assignments, such as keeping employee work records, preparing the payroll, and completing paperwork to comply with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws.

The petitioner's description of the proffered position corresponds generally to the above description of a food service manager. The individual in the proffered position will manage staff, prepare work schedules and assign duties; will interview, hire, and train employees; will coordinate pricing and sales of products; and will be responsible for a number of administrative and human resources tasks including recruiting and retaining employees, duties that are similar to a food service manager.

The petitioner in this matter also provides generic statements regarding the duties of the proffered position, indicating that the individual in the position will review financial statements, sales and activity reports to measure productivity and goal achievement to determine cost reduction and program improvements; will establish and implement company policies, goals, objectives, and procedures; and will manage the movement of inventory into and out of the company. The petitioner does not provide sufficient detail regarding these vaguely described duties to ascertain the actual tasks that would be associated with them. Thus, it is not possible to determine whether these duties are the duties of an administrative services manager, an operations manager, an operations analyst, or that the duties involve any tasks that require the theoretical and practical application of a body of highly specialized knowledge obtained through a four-year course of study at the university level.

Regarding the duties of a food service manager as generally outlined by the petitioner, the *Handbook* reports that many food services managers are promoted from food services workers and that community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification. The AAO acknowledges that there are bachelor's degree programs offered in restaurant and food service management and that such a degree provides preparation for a career in this occupation. However, the *Handbook's* acknowledgement of four-year programs in restaurant and hospitality management does not alter the fact that many employers do not require a bachelor's degree for employment in this occupation. The variety of the type of preparation for work in these service industries, from experience alone to a community or trade school education to completion of a four-year program, demonstrates that a baccalaureate or higher degree or its equivalent is not the normal minimum requirement for entry into positions similar to that of a general manager of three fast food service restaurants. The petitioner has not offered a description of duties that establishes that the proffered position requires a baccalaureate or higher degree in a specific discipline for employment in this occupation.

The AAO acknowledges the petitioner's excerpt from the Department of Labor's *O*NET* and the JobZone rating of four. However, the AAO does not consider the *O*NET* to be 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. *O*NET* 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. The *O*NET* does not describe how the number of years associated with a particular position is divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Again, the record does not demonstrate that the occupation of a general manager of three fast-food restaurants would require the beneficiary to have attained a bachelor's degree or its equivalent in a specific specialty to perform the duties of the occupation.

The AAO also acknowledges the position evaluation authored by Professor Sackler but finds that Professor Sackler's evaluation lacks analysis and is not based on a factual foundation. For example, Professor Sackler opines: "[c]ompanies seeking to employ a General Manager require prospective candidates to possess at least [a] Bachelor's degree in the area of Hospitality Management, or a related field from an accredited institution of higher learning;" but Professor ████████ does not explain how this opinion was reached. Professor ████████ does not discuss the type or size of companies that require general managers to possess a bachelor's degree in hospitality management. Professor ████████ does not discuss the duties of the companies' general managers he believes require a bachelor's degree. Professor ████████ does not offer an analysis of the duties he finds are ""highly business-oriented and require skills in Hospitality Management, and other related areas," but relies instead, only on the petitioner's general description of the proffered position. Professor Sackler does not indicate he interviewed the petitioner, recognized the nature and size of the petitioner's business, or understood the actual tasks associated with the proffered position. He does not cite any industry surveys or other trade literature in support of his conclusions. 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)). Accordingly, Professor ████████ opinion is insufficient to establish the proffered position includes duties that comprise a specialty occupation. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence.

Matter of Caron International, 19 I&N Dec. 791 (Comm. 1988). The *Handbook* offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. Professor Sackler's conclusory and unsupported opinion is insufficient to overcome the *Handbook's* report that the position of a food service manager does not require a degreed individual.

The petitioner has not provided a description of duties or other documentary evidence to establish that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. Thus the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Turning to the next criterion, the petitioner has submitted seven job announcements to demonstrate that a specific degree requirement is common to the industry in parallel positions among similar organizations. However, the seven job announcements confirm the *Handbook's* report that a bachelor's degree in a specific discipline is unnecessary for a general manager's position. None of the advertisements submitted indicate that a bachelor's degree in a specific discipline is required. The advertisements indicate a preference for a high school diploma, one-year certificates from college or technical schools, or a bachelor's degree in the food service or nutrition field. Only one of the job announcements indicates that a college degree is required and that advertisement does not specify a specific discipline for the degree.

Moreover, the organizations advertising for general manager positions, an international airline catering company, a restaurant group, a bakery, two contract food services, and the Waldorf Astoria do not appear similar to the petitioner, a company operating three fast-food restaurants. The organization most like the petitioner, Boston Market, only requires experience in the industry and indicates a preference for a bachelor's degree in an unspecified discipline, again substantiating that the industry does not have a standard of requiring a bachelor's degree in a specific discipline for general managerial positions. In addition, the petitioner's generalized description of the proffered position does not establish that the proffered position is parallel to any of the advertised positions. The record does not establish that a degree requirement in a specific discipline is an industry standard for parallel positions within similar organizations. The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to establish the second prong of the second criterion. The record does not contain evidence that would show the proffered position is so complex or unique that only an individual with a degree can perform the position. The description of the duties of the proffered position is that of a type of food and beverage service manager, an occupation that the *Handbook* indicates does not require a bachelor's degree in a specific specialty. The petitioner has not provided evidence of complex or unique elements that are indicative of a position that could only be performed by a degreed individual, whose degree is in a specific discipline. The AAO acknowledges the petitioner's desire to franchise its Captain Shrimp quick service restaurant, but the record does not contain documentary evidence that the petitioner has done more than express this desire on a website. In addition, the petitioner does not describe how the proffered position would be involved in any expansion. The description of the position does not include evidence that the skills listed as necessary for the petitioner's general manager position are more complex or unique than similar, but non-degreed, employment. The petitioner has, accordingly, failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. The AAO usually 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. The record suggests that the petitioner will be employing an individual for the first time in the proffered position. Thus, the record does not establish that the petitioner normally requires a degree for the proffered position. Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion does not establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

Turning to the fourth criterion, the duties of the proffered position do not exceed the scope of those performed by a food services manager, an occupation that does not require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4); namely, that the petitioner establish that the nature of the specific 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. The petitioner has provided a general description of the duties associated with the proffered position but has not explained how or offered documentary evidence to substantiate that the nature of the duties is specialized and complex, beyond the routine duties of these types of service managers. The petitioner has not explained how the performance of the routine duties of these service occupations requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in a specific specialty (or its equivalent) as a minimum for entry into the occupation. Neither the descriptions of duties nor any evidence of record establish that the position as described requires the performance of an amalgam of duties that would elevate the position to one that is so specialized or complex as to be usually associated with at least a bachelor's degree in a specific specialty.

As noted above, Professor Sackler's opinion does not provide sufficient detail about the complexity of the duties in relation to the petitioner's actual fast food business to substantiate his conclusion: "[c]ompanies seeking to employ a General Manager require prospective candidates to possess at least [a] Bachelor's degree in the area of Hospitality Management, or a related field from an accredited institution of higher learning." Professor Sackler does not explain how his opinion, one that is significantly different from that of the *Handbook*, should overcome the *Handbook's* report. Moreover, Professor Sackler has not provided a factual foundation to support his opinion. The AAO finds that the opinion is not in accord with other information and does not accept the opinion as evidence. *Matter of Caron International*, 19 I&N Dec. at 791.

Accordingly, the record does not contain evidence that the proffered position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Although the AAO finds that the position of in this matter is not a specialty occupation, the AAO will address the issue of the beneficiary's qualifications to perform a specialty occupation.

Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2), states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

- (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
- (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- (C)
 - (i) experience in the specialty equivalent to the completion of such degree, and
 - (ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

In this matter, the petitioner has not provided evidence nor does the petitioner assert that the beneficiary qualifies to perform a specialty occupation pursuant to 8 C.F.R. §§ 214.2(h)(4)(iii)(C) (1), (2), or (3); but rather that the record demonstrates that the beneficiary has a combination of education and work experience sufficient to qualify her to perform services in a specialty occupation pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4).

When determining a beneficiary's qualifications under 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), the AAO relies upon the five criteria specified at 8 C.F.R. § 214.2(h)(4)(iii)(D). A beneficiary who does not have a degree in the specific specialty may still qualify for an H-1B nonimmigrant visa based on:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

The record contains an evaluation that has been revised which discusses the beneficiary's foreign education and her work experience, a copy of the beneficiary's foreign diploma and transcripts, and a letter from the beneficiary's prior foreign employer. The revised evaluation, dated October 24, 2006, concludes that the beneficiary's foreign *bachelor em direito* degree is the equivalent of a United States "*Juris Doctor*" degree. Within the body of the evaluation report, the evaluator states that the courses completed and the number of credit hours earned by the beneficiary satisfies requirements substantially similar to those required toward the completion of four years of academic coursework towards a "*Juris Doctor*" degree from an accredited institution of higher education in the United States. The AAO finds that the evaluation of the beneficiary's academic education is deficient. The evaluator does not find that the beneficiary has the equivalent of a United States degree in a specific discipline. In the United States education system, the *Juris Doctorate* is a graduate degree. Thus, the beneficiary's four years of study in an undergraduate setting in Brazil is not equivalent to a United States *Juris Doctorate* degree. The evaluator in this matter does not distinguish between study at an undergraduate level and a graduate degree level. The AAO finds that the evaluation shows that the beneficiary has a bachelor of laws degree from a foreign university and accepts that the beneficiary's foreign education qualifies her to perform the duties of a general manager of three fast food restaurants; however, as determined above, the proffered position is not a specialty occupation. The director's decision on this issue is withdrawn. However, the petition may not be approved as the petitioner has not established the proffered position is a specialty occupation.

The petition will be denied and the appeal dismissed for the above stated reason. 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.