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U.S. Citizenship
and Immigration
Services

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FILE: WAC 03 010 54646

Office: CALIFORNIA SERVICE CENTER

Date: JAN 04 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 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 restaurant and hotel-management group that seeks to employ the beneficiary as a food service 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 because the proffered position failed to qualify as a specialty occupation. On appeal, counsel submits a brief and a letter from the restaurant's operations manager.

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 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 restaurant food services manager. Evidence of the beneficiary's duties includes: the Form I-129; the letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would:

- Manage banquet staff and advertise banquet operations;
- Collect and pay restaurant bills;
- Order restaurant food supplies; and,
- Manage customer and supplier relations.

The petitioner stated that the beneficiary is qualified for the position because the combination of his academic training and experience are the equivalent of a bachelor's degree in geography and management.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). Referring to the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), the director found that the duties of the proffered position do not require a bachelor's degree in a specific specialty.

On appeal, counsel states that the proffered position is a specialty occupation. Counsel states that a minimum entry requirement for a candidate seeking the proffered position is a bachelor's degree that enables a person to handle "the scope and complexity" of the job and provides a college-level understanding of sociology, economics, business law, accounting and financial management. Counsel submitted job ads from the Internet revealing the bachelor's degree requirement in parallel or similar jobs.

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

When determining whether a 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 *Handbook* in determining whether a position requires a baccalaureate or higher degree or its equivalent for entry into the occupation. A review of the *Handbook* discloses that the director correctly determined that the beneficiary's duties parallel those performed by food service managers. For example, the *Handbook* explains that food service managers recruit, interview, hire, and fire employees; select successful menu items; on a daily basis, estimate food consumption, place orders with suppliers, and schedule the delivery of fresh food and beverages; arrange for equipment maintenance and repair; coordinate services such as waste removal and pest control; oversee employee training; schedule the work hours of employees; and supervise the kitchen and dining rooms, such as overseeing food preparation and cooking, and investigating and resolving customers' complaints about food quality or service. In addition, the *Handbook* reports that, in small establishments, food service managers keep records of the hours and wages of employees, prepare the payroll, and fill out all paperwork in compliance with licensing laws and reporting requirements of tax, wage and hour, unemployment compensation, and Social Security laws.

With respect to the qualifications, training, and advancement of food service managers, the DOL states that food and restaurant chains prefer to hire people with degrees in restaurant and institutional food management, but they often hire graduates who have degrees in other fields and have demonstrated interest and aptitude. Promoting experienced food and beverage preparation and service workers, the *Handbook* explains, fills some restaurant and food service manager positions. The *Handbook* also mentions that most restaurant chains and food service management companies have rigorous training programs for management positions. Thus, according to the *Handbook*, candidates for the offered position would not be required to possess a bachelor's degree in a specific specialty. Accordingly, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - the petitioner has supplied job ads from the Internet announcing openings for restaurant managers and calling for minimum entry qualifications of bachelor's degrees. Nothing in the record, however, shows the establishments are the same or similar to the petitioner or that the positions advertised are parallel to that of the proffered position. While counsel asserts the positions in the ads are "parallel positions among similar organizations," the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

No evidence is in the record that would show the proffered position is so complex or unique that only an individual with a degree can perform it. Thus, the petitioner has not established the position meets the first or second criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Although the petitioner claims that it normally requires a degree or its equivalent for the position, there is no evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). Moreover, 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 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.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. According to counsel, the duties of the proffered position are complex, requiring a bachelor's degree. To the extent that are described in the record, the duties of the position do not require the knowledge associated with the attainment of a degree in a specific specialty.

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.

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.