

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave. N.W., Rm. A3042
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

D2



FILE:



Office: VERMONT SERVICE CENTER

Date: APR 05 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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of 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 corporation engaged in restaurant management. In order to employ the beneficiary as an operations manager, 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 director denied the petition on the basis that the petitioner had failed to establish that the proffered position met the requirements of a specialty occupation. The director essentially found that the proffered position most closely resembles the food services manager occupation, which is one for which the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* does not indicate that a bachelor's degree in a specific specialty is normally a minimum hiring requirement.

On appeal, counsel contends that the director's classification of the proffered position is erroneous. According to counsel, the scope of the proposed duties exceed those of a food services manager, and are so specialized and complex as to require at least a bachelor's degree, or its equivalent, in hotel and restaurant management or a related field.

The director's denial of the petition was correct. The AAO bases this decision upon its consideration of the entire record of proceeding before it, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the director's request for additional evidence (RFE); (3) the materials submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and its attachments.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation.

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.

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.

Consonant 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. (Italics added.)

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) has consistently interpreted 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, CIS 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.

Counsel's brief (at pages 1 and 2) describes the proposed duties as follows:

- Interview, hire, and train new employees.
- Prepare employee work schedules, oversee work of employees and evaluate employees[.]
- Conduct regular employee meetings as required to resolve employee-related operational problems, provide training for employees and maintain employee morale.

- Oversee preparation of management reports associated with operating the business; maintain daily and weekly inventory information; oversee ordering processes for food and beverage supplies; and complete other paperwork as required.
- Maintain daily supply records, prepare and budget for daily operations, control payroll, track invoices from vendors and track daily receipts.
- Oversee the development of promotional materials for marketing of the business to surrounding homes and businesses, maintain good customer relations and handle all customer complaints to maintain goodwill within the community.
- Ensure that all equipment is maintained in good working order to ensure minimal food waste and spoilage and to ensure a clean, safe and sanitary environment.
- Oversee food preparation, set up, and staffing processes for banquets and special functions.
- Approve invoices and prices from vendors.
- Oversee the food preparation processes and oversee the creation of profitable daily specials.

The petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which assigns specialty occupation status to a position for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties.

The AAO recognizes the *Handbook* as an authoritative source on the duties and educational requirements of a wide variety of occupations. Accordingly, the AAO consulted the 2004-2005 edition of the *Handbook* for information relevant to the proffered position as described by the petitioner. The AAO determined that, contrary to counsel's assessment, the proffered position substantially comports with the food services manager occupation as described in the *Handbook*. Counsel is incorrect in asserting that the preparation of work schedules, conducting employee meetings, resolving operational problems, maintaining weekly inventory information, and ensuring that equipment is in working order are duties not normally performed by a food service manager. These duties are either expressly identified in the *Handbook* or well within the scope of the duties discussed in the *Handbook*. Preparation of management reports, budget preparation, and the development of promotional materials are arguably beyond the general scope of a food service manager's duties, but the petitioner describes these duties exclusively in generalized, generic terms that do not indicate a material increase in responsibilities that would make the food services manager classification inaccurate. The *Handbook* indicates that employers of food service manager positions do not normally require at least a bachelor's degree in a specific specialty.

Even if counsel were correct in classifying the position as a higher management or top executive position, the outcome would be the same. The critical element is not the title of the position, 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. Neither the Act, CIS regulations, nor CIS precedent decisions recognize executive managers or top executives as a specialty-occupation class.¹ *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988) a precedent decision issued by the Immigration and Naturalization Service (CIS' predecessor agency) recognized that managers are generally not considered as "members of the professions" (the standard that has been replaced by the "specialty occupation" requirements). Likewise, the *Handbook* section on top executives indicates that there are no standard degree requirements for these positions. Even if the proffered position were classified as an executive management or top executive position, the duties as described in the record do not establish the need for a bachelor's degree or the equivalent in a specific specialty.

The position evaluation rendered by the Seattle Pacific University (SPU) professor has little evidentiary significance. Although the professor is an expert in the field of business administration, neither his evaluation nor resume establish him as having specialized knowledge in the restaurant business or in the field of hospitality management. Furthermore, he does not present a sufficient factual basis for his conclusions: he cites no studies, research, or restaurant business experience. Furthermore, the professor does not address the apparent conflict between his opinion and the job advertisements submitted by the petitioner. While the professor opines that there is an industry-wide standard requirement for at least a bachelor's degree in hotel and restaurant management or a related field, the job advertisements submitted by the petitioner specify a wide range of acceptable educational credentials, including a preference, rather than a requirement, for a bachelor's degree, and a bachelor's degree alone, with the employer specifying no particular major. The opinion also lacks support for the professor's conclusion that some of the duties require a degree in a specific specialty. For instance, among the duties that the professor identifies, without explanation, as "specialized and requir[ing] professional theoretical knowledge in the appropriate business areas" are "ensuring that all equipment is maintained in good working order," "possessing a high level of communication skills," and "performing as both an individual and team contributor." CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, CIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

As the evidence of record has not established that the proffered position is one that normally requires a minimum of at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not satisfied either of the alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

¹ Counsel (brief, at last page) misstates the holding of *Arctic Catering v. Thornburgh*, 469 F. Supp. 1167 (D. Colo. 1991): that case did not issue a holding about management positions in general; and it did not address a specialty occupation issue, but applied an earlier standard that preceded the statutory and regulatory requirements for a specialty occupation.

The first alternative prong assigns specialty occupation status to a proffered position with a requirement for at least a bachelor's degree, in a specific specialty, that is common to the petitioner's industry in positions that are both (1) parallel to the proffered position and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by CIS 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 already discussed, the evidence does not establish that the proffered position is a type for which the *Handbook* indicates an industry-wide requirement for at least a bachelor's degree in a specific specialty. The record does not include any submissions from firms or individuals in the industry attesting that they routinely employ and recruit only persons with at least a bachelor's degree in a specific specialty. There are no submissions from a professional association. As already discussed, the SPU professor does not qualify as an expert in the industry and, in addition, he did not provide a sufficient factual basis to substantiate his opinion. Finally, the job advertisements in the record do not reflect that a bachelor's degree in a specific specialty is an industry-wide recruiting and hiring standard. The advertising employers' statements of educational requirements include: "college degree" (no major or area of concentration specified); "four-year degree" (no major or area of concentration specified); "bachelor's degree" (no major or area of concentration specified); a preference for a bachelor's degree in "Hospitality Management, Business Administration or other related field"; "bachelor's degree" (no major or area of concentration specified); "4 year degree" (no major or area of concentration specified); "college degree"; "BS/BA preferred"; "4 year college degree preferred," but "need high school diploma"; and "BA/BS Business, Production/Operations Management, Food Science, Biology, Microbiology, Engineering, or any related bachelor's degrees. MBA is a plus."

The evidence of record does not qualify the proffered position under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." Such a level of complexity or uniqueness is not evident in the record's depictions of the proposed duties. Counsel's contention that the SPU professor's opinion has satisfied this criterion is incorrect. As earlier discussed, the record does not establish that the professor's opinion merits special weight or consideration. Furthermore, the professor's statements about the nature of the proffered position are conclusory and therefore unpersuasive. They are not supported by any meaningful analysis.

The petitioner has not met the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) for a position for which the employer normally requires at least a baccalaureate degree or its equivalent in a specific specialty.

Counsel relies on the fact that CIS had approved a prior H-1B petition for the beneficiary to serve as its operations manager. However, a prior approval of one petition does not establish a history of the petitioner's normal hiring requirements.

Finally, the evidence does not satisfy the criterion at 8 C.F.R. § 214.2(h)(iii)(A)(4) for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. To the extent that they are described in the record, the duties do not appear so specialized and complex. Counsel's contrary assertion is not evidence, and counsel's continued reliance on the SPU professor's opinion is not merited, for reasons already discussed, including the fact that the professor has not provided a factual basis and an analysis of how the proposed duties support his opinion. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Furthermore, 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).

The following comment is in response to counsel's references to the fact that CIS had previously approved an H-1B petition for the beneficiary to work as the petitioner's operations manager.

The director's decision does not indicate whether he reviewed the prior approval of the other nonimmigrant petition. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). A prior approval does not preclude CIS from denying an extension of an original visa petition based on a reassessment of the petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of a beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

As the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), the director's decision shall not be disturbed.

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. Accordingly, the appeal will be dismissed.

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