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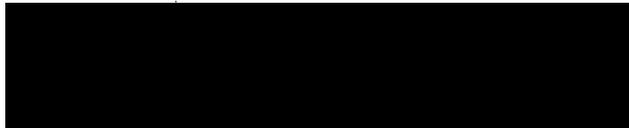
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FILE: WAC 04 142 52078 Office: CALIFORNIA SERVICE CENTER Date: **DEC 23 2005**

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:

SELF-REPRESENTED

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 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 non-profit organization that seeks to employ the beneficiary as a director of food service. 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 is not a specialty occupation. On appeal, the petitioner submits additional and previously submitted evidence.

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.

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; (5) the petitioner's motion to reopen/reconsider; (6) the director's affirmation of the denial; and (7) Form I-290B. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a food service manager. Evidence of the beneficiary's duties includes: the Form I-129; the documents accompanying the Form I-129; the petitioner's support letter, and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail providing leadership and management of the food service operation and establishing a team; developing and overseeing a training program for food service employees and ensuring a sense of teamwork; developing and initiating an ongoing assessment and communication program to satisfy the needs and expectations of the primary users of the facility; preparing and administering the budget for the food service operation; developing creative menus and serving food in an attractive manner through a comprehensive meal program that has flexible and convenient dining options and hours of service; directing the preparation and maintenance of narrative and statistical reports, records, and files; communicating with administrators, district personnel, and contractors to coordinate activities and programs, resolve issues and conflicts, and exchange information; working with community groups, media, and legislators to increase their understanding and support of the program; supervising and evaluating the performance of assigned staff; interviewing and selecting employees and recommending transfers, reassignment, termination, and disciplinary action; developing and preparing the annual budget for the Food Services Department; analyzing and reviewing budgetary and financial data; monitoring and authorizing expenditures in accordance with established guidelines; and overseeing food services activities and special functions including conferences, dinners, and banquets. The petitioner's April 16, 2004 letter indicated that it requires at least a baccalaureate degree in food service management or related courses and experience for the proposed position.

In denying the petition, the director stated that the nature and complexity of the proposed duties, combined with the nature of the petitioning entity, are factors that are considered when determining whether a position qualifies as a specialty occupation. The director stated that performing incidental specialty occupation duties does not establish the proposed position as a specialty occupation. The director found that from the evidence in the record, the proposed position parallels a food service manager as that occupation is described in the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*), and that the *Handbook* reveals that a food service manager does not require a bachelor's degree in a specific specialty. The submitted job postings did not persuade the director to find that the petitioner's particular degree requirement is standard in the industry; and the director found the proposed job duties described in generic terms, providing no detail as to their uniqueness or complexity. Because the proposed position is newly created, the director concluded that the petitioner could not show a past practice of employing a food service director holding at least a bachelor's degree. The director discussed *Defensor v. Meissner*, 201 F.3d 384, 387 (5<sup>th</sup> Cir. 2000).

On appeal, the petitioner states that the proposed position is a specialty occupation. According to the petitioner, most organizations similar to the petitioner normally require a bachelor's degree for the proposed position. The petitioner indicates that the proposed position is newly created and requires a degreed candidate due to the specialization and complexity of the duties.

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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In 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.

CIS routinely consults the *Handbook* for the educational requirements of particular occupations. The *Handbook* reveals that the proposed duties are a combination of those of a chef and a food service manager. The *Handbook* states that chefs are responsible for directing the work of kitchen workers, estimating food requirements, ordering food supplies, creating recipes, and preparing meals. The *Handbook* reports that food service managers assist executive chefs in selecting successful menu items. It also states:

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.

As described in the *Handbook*, executive chefs who work in fine restaurants require many years of training and experience. Some chefs start their training in high school or post-high school vocational programs. Others receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. Many are trained on the job.

The *Handbook* indicates that employers do not require food service managers to have a baccalaureate degree in a specific specialty. It reports that national and regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs. Although restaurant chains prefer to hire candidates with degrees in restaurant and institutional food service management, they often hire graduates with degrees in other fields. Furthermore, waiters, waitresses, chefs, and fast-food workers sometimes advance to assistant manager or management trainee jobs. Both 2- and 4-year programs, the *Handbook* states, provide instruction in “nutrition, sanitation, and food planning and preparation,” and “accounting, business law and management, and computer science.”

As discussed above, the *Handbook* reveals that the proposed duties are a combination of those of a chef and a food service manager, occupations that do not require a specific baccalaureate degree. Consequently, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To satisfy the first prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must show that a degree requirement is common to the industry in parallel positions among similar organizations. The director correctly found the three job postings unpersuasive in establishing this criterion. Either the postings are from employers that differ in nature from the petitioner, a small nonprofit that provides services to homeless veterans; or the nature of the employers in the postings is not described; or the postings do not indicate the requirement of a baccalaureate degree in a specific specialty. The postings from a university and Central Market (there is no description of this employer) do not indicate that the baccalaureate degree must be in a specific specialty. The posting from Aramark reveals that it differs in nature from the petitioner as Aramark has 200,000 employees. For these reasons, the postings fail to establish that a degree requirement is common to the industry in parallel positions among similar organizations.

To establish the second prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner must show that the proposed position is so complex or unique that it can be performed only by an individual with a bachelor’s degree in a specific specialty. As discussed earlier, the proposed duties are a combination of those of chefs and food service managers, and the *Handbook* reveals these occupations do not require a baccalaureate degree in a specific specialty. Consequently, the petitioner fails to establish the second prong of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) requires the petitioner to establish a past practice of normally requiring a degree or its equivalent for the position. The proposed position is newly created; thus, the petitioner cannot establish a past practice of requiring a degree.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires the petitioner to 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 in a specific specialty. The *Handbook* discloses that the proposed duties mirror those of a chef and food service manager, which are occupations that do not require a bachelor’s degree in a specific specialty. The submitted evidence of the organizational chart, the website information, and the proposed job description are inadequate to show that the proposed duties are

specialized and complex, requiring a baccalaureate degree in food service management or related courses. The petitioner, therefore, fails to establish 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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 on this ground.

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.