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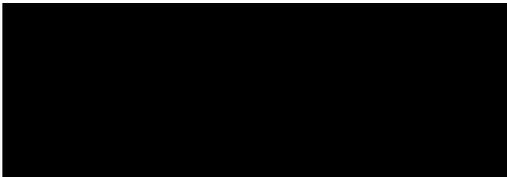
FILE: LIN 04 264 53142 Office: NEBRASKA SERVICE CENTER Date: **APR 26 2006**

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, Chief
Administrative Appeals Office

DISCUSSION: The director of the Nebraska 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 foodservice company that provides catering services to universities, was established in 1987, and has 85 employees. It seeks to employ the beneficiary as a catering and concessions manager 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 based on his determination that the proffered position was not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE, dated November 1, 2004; (4) the director's denial letter; and (5) Form I-290B, with the petitioner's appeal brief, and new and additional evidence.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a 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 Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

Citizenship and Immigration Services (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.

To determine whether a particular job qualifies as a specialty occupation, CIS 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. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as a catering and concessions manager.

At the time of filing, and in response to the RFE, the petitioner stated that the duties of the proffered position would require the beneficiary to plan, direct, and coordinate catering service activities, and oversee the daily activities of dining services and event concession stands. The petitioner specified the job duties as follows:

- Schedule associates for catering events on a weekly basis;
- Compare budgeted labor to estimated sales to ensure the labor budget is met;
- Meet with customers to organize event details;
- Assign duties to associates and work with the chef to produce a proper flow of events;
- Train associates to properly serve all types of events;
- Order food and supplies; and
- Track financial forms in order to adjust expenses if necessary;

The petitioner stated that it required a bachelor’s degree.

The director found that the proffered position was not a specialty occupation because the duties are not so specialized and complex as to require a bachelor’s degree in a specific field of study. The director noted that the petitioner submitted no evidence to establish that a baccalaureate degree or its equivalent is

normally the minimum requirement for entry into the position. The director found further that the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel references a job description and degree requirement for the petitioner's Catering Manager II position that the petitioner included in the response to the RFE. The position's duties include budgeting, operational performance, supervising staff, and developing menu planning and food distribution policies. Counsel asserts that the Catering Manager II job position is similar to the proffered catering and concessions manager position because both require budgeting, operational performance, supervising staff, and developing menu planning and food distribution policies. In the response to the RFE, the petitioner submitted Internet job advertisements from food service companies to demonstrate the industry requirement for a related bachelor's degree.

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.

To determine whether the duties just described are those of 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; and 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 considered by the AAO when determining these criteria include: whether the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, 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)).

The AAO now turns to a consideration of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position. The AAO finds the proffered position to be similar to that of a food service manager, based on the discussion of that occupational title in the 2006-2007 edition of the *Handbook*.

The 2006-2007 *Handbook's* description of the employment of food service managers, at <http://www.bls.gov/oco/ocos023.htm>, 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.

...

Managers interview, hire, train, and, when necessary, fire employees. Retaining good employees is a major challenge facing food service managers. Managers recruit employees at career fairs, contact schools that offer academic programs in hospitality or culinary arts, and arrange for newspaper advertising to attract additional applicants. Managers oversee the training of new employees and explain the establishment's policies and practices. They schedule work hours, making sure that enough workers are present to cover each shift. If employees are unable to work, managers may have to call in alternates to cover for them or fill in themselves when needed. Some managers may help with cooking, clearing tables, or other tasks when the restaurant becomes extremely busy.

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality or service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service. Managers direct the cleaning of the dining areas and the washing of tableware, kitchen utensils, and equipment to comply with company and government sanitation standards. Managers also monitor the actions of their employees and patrons on a continual basis to ensure the personal safety of everyone. They make sure that health and safety standards and local liquor regulations are obeyed.

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. ...

With respect to the educational qualifications for food service managers, the *Handbook* states:

Experience in the food services industry, whether as a full-time waiter or waitress or as a part-time or seasonal counter attendant, is essential training for a food services manger. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs

which require internships and real-life experience to graduate. Some restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated experience, interest and aptitude. Many restaurant and food service manager positions—particularly self-service and fast-food—are filled by promoting experienced food and beverage preparation and service workers....

The *Handbook* does not establish a specific degree requirement for food service managers. Instead, it emphasizes food service experience, and indicates that companies that prefer degreed candidates often hire individuals whose degrees are in unrelated fields, but who have demonstrated experience, interest and aptitude. The *Handbook* is clear that a baccalaureate degree or its equivalent is not the normal minimum requirement for entry into the occupation.

Accordingly, the AAO finds that the petitioner has failed to establish the proffered position as a specialty occupation under the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) – a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

The AAO now turns to a consideration of whether the proffered position may qualify as a specialty occupation under either of the prongs of the second criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) – the petitioner must establish that a degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree.

To establish its degree requirement as the norm within its industry, the petitioner submitted five Internet job postings for food service managers. Counsel contends that these five advertisements are proof that a bachelor's degree is common in the food service industry. The AAO does not agree.

None of the advertisements are published by organizations that may be considered similar to the petitioner, a university catering service. One of the advertisements is from an airline; another from a non-profit organization providing services for people with disabilities. The remaining advertisements come from the same Fortune 500 company, which provides a range of support and management services, only one of which is catering, to various types of organizations. The AAO notes that the descriptions of the duties in the five announcements either do not describe employment parallel to the proffered position or lack the specificity necessary to make that determination. Accordingly, the announcements do not establish a degree requirement in parallel positions among similar organizations, as required to satisfy the criterion's first prong.

The record also does not include any evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Therefore, the record also fails to establish that the position qualifies as a specialty occupation under the second prong of the second criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) – the position is so complex or unique that it can be performed only by an individual with a degree.

Accordingly, the petitioner has not established its position as a specialty occupation under either prong of the second criterion.

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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.

To determine the petitioner's ability to meet the third criterion, the AAO normally 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. On appeal, counsel references the petitioner's submission of the job description for a Catering Manager II position as evidence that it normally requires a bachelor's degree for the proffered position. She contends that this job description is a "viable job description" for the proffered position as the petitioner is a national company and its job descriptions and duties remain constant across the country. Again, the AAO does not agree.

The AAO finds the two positions to be distinct, with the Catering Manager II position having significantly broader responsibilities. The Catering Manager II job description indicates that the incumbent would be responsible for all catering activities, including booking, planning and the direction of all functions. However, the petitioner's description of the proffered employment outlines a role that would require the beneficiary to execute already established plans, ordering food and supplies and overseeing the petitioner's personnel. The Catering Manager II description also indicates that a manager in the position would be responsible for developing and maintaining marketing plans for the petitioner's catering department. Again, the proffered position assigns no marketing duties to the beneficiary. The financial responsibilities of the respective positions also differ. The proffered position would require the beneficiary only to "track financial forms in order to adjust expenses if necessary;" The Catering Manager II description states that this individual is responsible for the reporting of operational statements, reports, and operational budgets, and the review of the collection of receivables. Therefore, the petitioner's submission of its job description for a Catering Manager II does not establish its normal hiring practices regarding the proffered position.

In that the record provides no evidence related to its hiring practices for the proffered position, it does not establish the proffered position as a specialty occupation under the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4) requires that a petitioner establish that the nature of the specific duties of the position are so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The job description of the petitioner's catering and concessions manager does not, however, outline duties of the complexity or specialization to require the attainment of a baccalaureate degree or higher. The position involves basic duties for catering events such as scheduling and assigning associates, ordering food and

supplies, and meeting with customers to organize event details. Its duties, as described, do not require the beneficiary to have knowledge or skills beyond those normally required of a food service manager, employment that the *Handbook* indicates does not impose a degree requirement on those seeking entry-level employment.

On appeal, counsel contends that the duties of the proffered position satisfy the criterion's requirements, and asserts that the position is complex because the beneficiary will be responsible for tracking food products through the Food and Drug Administration's (FDA) Hazard Analysis and Critical Control Point (HACCP) food safety approach, and is responsible for reporting monthly food safety inspections of each company building. The AAO will not, however consider the duties introduced by counsel on appeal, as they were not previously described by the petitioner, either at the time of filing or in response to the director's RFE. On appeal a petitioner cannot offer a new position to a beneficiary or materially change a position's title, level of authority within the organizational hierarchy or the associated job responsibilities. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). The AAO notes that these HACCP tracking duties are also not identified in the Catering Manager II job description, the position counsel contends reflects the duties of the proffered position.

Therefore, the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position meets the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). 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.