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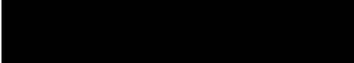
U.S. Citizenship
and Immigration
Services

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FILE: SRC 05 162 52548 Office: TEXAS SERVICE CENTER Date: **OCT 25 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

Robert P. Wiemann, Chief
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 restaurant that seeks to employ the beneficiary as a catering director. 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 finding that the petitioner did not establish the offered position as a specialty occupation. Counsel submitted a timely appeal.

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) the Form I-129 and supporting documentation; (2) the director's notice of intent to deny; (3) the petitioner's response to the director's notice; (4) the director's

denial letter; and (5) the Form I-290B, counsel's brief, and letters from other companies. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner seeks to employ the beneficiary as a catering director. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the petitioner's support letter; and the petitioner's response to the director's request for evidence. These documents describe the proposed duties as follows: coordinates food service activities of the restaurant at social functions; estimates food and beverage costs; requisitions or purchases supplies; confers with food preparation and other personnel to plan menus and related activities for the dining room, bar, and banquet operations; directs the hiring and assignment of personnel; investigates and resolves food quality and service complaints; reviews financial transactions and monitors the budget to ensure the petitioner operates efficiently and expenditures are within budget. For the proposed position, the petitioner's April 15, 2005 letter states that the petitioner requires a "[b]achelor's degree or [the] equivalent."

In denying the petition, the director stated that the 2004-2005 edition of the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) reveals that a catering director would not require a baccalaureate degree in a specific academic specialty. The director found the letters from other companies unpersuasive in establishing the requirement of a baccalaureate degree for the offered position.

On appeal, counsel states that the industry standard is to require "a degree or the equivalent" for the proposed position. Counsel asserts that the submitted letters from other companies and the job postings demonstrate that the offered position qualifies as a specialty occupation. According to counsel, the director failed to consider the submitted job postings, the petitioner's seating capacity for 325 diners, the complexity of the work to be performed, and the letters that demonstrate the industry standard is a bachelor's degree or the equivalent for the proposed position. Counsel states that *Unical Aviation, Inc. vs. United States INS*, 248 F. Supp. 2d 931 (C.D. Cal. 2002) indicates that a specialty occupation requires specialized study and complex job duties. Counsel maintains that the beneficiary is qualified for the proposed position.

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.

In determining whether the offered position qualifies as 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 2006-2007 edition of 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)).

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* regarding the duties and educational requirements of occupations. Based on the proposed job description, the duties are encompassed within the *Handbook's* description of a food service manager which states the following:

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 most full-service restaurants and institutional food service facilities, the management team consists of a *general manager*, one or more *assistant managers*, and an *executive chef*. The executive chef is responsible for all food preparation activities, including running kitchen operations, planning menus, and maintaining quality standards for food service. 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. Assistant managers in full-service facilities generally oversee service in the dining rooms and banquet areas. In larger restaurants and fast-food or other food service facilities that serve meals daily and maintain longer hours, individual assistant managers may supervise different shifts of workers. In smaller restaurants, formal titles may be less important, and one person may undertake the work of one or more food service positions. For example, the executive chef also may be the general manager or even sometimes an owner. (For additional information on these other workers, see material on top executives and chefs, cooks, and food preparation workers elsewhere in the *Handbook*.)

One of the most important tasks of food service managers is assisting executive chefs as they select successful menu items. This task varies by establishment depending on the seasonality of menu items, the frequency with which restaurants change their menus, and the introduction of daily or weekly specials. Many restaurants rarely change their menus while others make frequent alterations. Managers or executive chefs select menu items, taking into account the likely number of customers and the past popularity of dishes. Other issues considered when planning a menu include whether there was any unserved food left over from prior meals that should not be wasted, the need for variety, and the seasonal availability of foods. Managers or

executive chefs analyze the recipes of the dishes to determine food, labor, and overhead costs and to assign prices to various dishes. Menus must be developed far enough in advance that supplies can be ordered and received in time.

Managers or executive chefs estimate food needs, place orders with distributors, and schedule the delivery of fresh food and supplies. They plan for routine services or deliveries, such as linen services or the heavy cleaning of dining rooms or kitchen equipment, to occur during slow times or when the dining room is closed. Managers also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control. Managers or executive chefs receive deliveries and check the contents against order records. They inspect the quality of fresh meats, poultry, fish, fruits, vegetables, and baked goods to ensure that expectations are met. They meet with representatives from restaurant supply companies and place orders to replenish stocks of tableware, linens, paper products, cleaning supplies, cooking utensils, and furniture and fixtures.

Managers interview, hire, train, and, when necessary, fire employees. . . .

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. . . . 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. Some of this work may be delegated to an assistant manager or bookkeeper, or it may be contracted out, but most general managers retain responsibility for the accuracy of business records. Managers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid.

Technology influences the jobs of food service managers in many ways, enhancing efficiency and productivity. Many restaurants use computers to track orders, inventory, and the seating of patrons. Point-of-service (POS) systems allow servers to key in a customer's order, either at the table, using a hand-held device, or from a computer terminal in the dining room, and send the order to the kitchen instantaneously so preparation can begin. The same system totals and prints checks, functions as a cash register, connects to credit card authorizers, and tracks sales. To minimize food costs and spoilage, many managers use inventory-tracking software to compare the record of sales from the POS with a record of the current inventory. Some establishments enter an inventory of standard ingredients and suppliers into their POS

system. When supplies of particular ingredients run low, they can be ordered directly from the supplier using preprogrammed information. Computers also allow restaurant and food service managers to keep track of employee schedules and paychecks more efficiently.

Food service managers use the Internet to track industry news, find recipes, conduct market research, purchase supplies or equipment, recruit employees, and train staff. Internet access also makes service to customers more efficient. Many restaurants maintain Web sites that include menus and online promotions, provide information about the restaurant's location, and offer patrons the option to make a reservation.

According to the petitioner, the beneficiary would coordinate the food service activities of the restaurant at social functions; estimate food and beverage costs and requisition or purchase supplies; confer with food preparation and other personnel to plan menus and related activities such as the dining room, bar, and banquet operations; direct the hiring and assignment of personnel; investigate and resolve food quality and service complaints; review financial transactions and monitor the budget to ensure that the petitioner operates efficiently and within budget. These duties are subsumed within the description of a food service manager. The *Handbook* indicates that a food service manager coordinates "activities among various departments, such as kitchen, dining room, and banquet operations"; oversees "the inventory and ordering of food, equipment, and supplies"; estimates "food needs, place[s] orders with distributors, and schedule[s] the delivery of fresh food and supplies"; assists "executive chefs as they select successful menu items"; investigates and resolves "customers' complaints about food quality or service"; and interviews, hires, trains, and fires employees. With the budget, the *Handbook* states "most general managers retain responsibility for the accuracy of business records" and that "[m]anagers also maintain records of supply and equipment purchases and ensure that accounts with suppliers are paid."

The *Handbook* conveys that a baccalaureate degree in a specific academic discipline is normally not required for a food service manager as it 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. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager or management trainee jobs. Executive chefs need extensive experience working as chefs, and general managers need prior restaurant experience, usually as assistant managers.

A bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation. Almost 1,000 colleges and universities offer 4-year programs in restaurant and hospitality management or institutional food service management; a growing number of university programs offer graduate degrees in hospitality management or similar fields. For those not interested in pursuing a 4-year degree, community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate degree or other formal certification. Both 2- and 4-year programs provide instruction in subjects such as nutrition, sanitation, and food planning and preparation, as well as accounting, business law and management, and computer science. Some programs combine classroom and laboratory study with internships providing on-the-job experience. In addition, many educational institutions offer culinary programs in food preparation. Such training can lead to a career as a cook or chef and provide a foundation for advancement to an executive chef position. Many larger food service operations will provide, or offer to pay for, technical training, such as computer or business courses, so that employees can acquire the business skills necessary to read a spreadsheet or understand the concepts and practices of running a business. Generally, this requires a long-term commitment on the employee's part to both the employer and to the profession.

Most restaurant chains and food service management companies have rigorous training programs for management positions. Through a combination of classroom and on-the-job training, trainees receive instruction and gain work experience in all aspects of the operation of a restaurant or institutional food service facility. Areas include food preparation, nutrition, sanitation, security, company policies and procedures, personnel management, recordkeeping, and preparation of reports. Training on use of the restaurant's computer system is increasingly important as well. Usually, after 6 months or a year, trainees receive their first permanent assignment as an assistant manager.

Counsel states that *Unical* indicates that a specialty occupation has a general requirement of specialized study and complex job duties. In *Unical*, the court determined whether the duties of Mr. Lin's position met any of the four "specialty occupation" criteria as outlined at 8 C.F.R. § 214.2(h)(4)(iii)(A). The court held that the legacy Immigration and Naturalization Service (INS) had abused its discretion in determining that Mr. Lin's position at Unical was not comparable to the description of the *Handbook's* "marketing research analyst" position, which the court determined qualified as a specialty occupation. The court found that the Unical job description was virtually indistinguishable from the duties of a "marketing research analyst" as described in the *Handbook*, thus satisfying the first criterion of the "specialty occupation" criteria. The court also found that Unical submitted sufficient evidence to show that it normally requires at least a baccalaureate degree for its position, satisfying the third of the "specialty occupation" criteria. In determining whether an occupation is a "profession," the court stated that the INS looks to "whether there is a general requirement of specialized study for the post, coupled with whether the position has complex and discretionary duties." The court found that Unical submitted sufficient evidence to demonstrate a requirement of specialized study for Mr. Lin's position.

In *Unicol*, the court stated that the INS looks to “whether there is a general requirement of specialized study for the post, coupled with whether the position has complex and discretionary duties.” Here, the AAO has found that the job description of catering director resembles that of a food service manager, and that the proposed position does not have “a general requirement of specialized study” as the *Handbook* reports that a food service manager does not normally require a baccalaureate degree in a specific academic discipline. Accordingly, the petitioner fails to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(ii)(A)(1), which is that a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position.

To establish the first alternative prong at 8 C.F.R. § 214.2(h)(4)(ii)(A)(2) - that a specific degree requirement is common to the industry in parallel positions among similar organizations - the petitioner submits letters and job postings from other companies. The letters from Broken Sound, Bill Hansen Catering, and the Biltmore Hotel, which were submitted in response to the request for evidence, state that a catering director “is definitely a specialty occupation as at least a bachelor’s degree or the comparable experience is necessary to perform the position as the duties are so complex.” All of the letters state “it is a common requirement in this industry to require a [c]atering [d]irector to have either a degree or the equivalent experience” and they provide an identical description of a catering director’s typical job duties. On appeal, counsel submits letters from Blue Café, Sunrise, and Il Migliore. In the letters the authors state that:

[R]estaurants of any size can cater out but especially ones of the size of [the petitioner] (325 seats). I can also state that it is a common requirement in this industry to require a [c]atering [d]irector to have either a degree or the equivalent experience.

The AAO finds that the letters are not persuasive in establishing that a specific degree requirement is common to the industry in parallel positions among organizations similar to the petitioner. The record contains no published reports stating that it is common in the restaurant and hospitality industry for a restaurant similar to the petitioner to require a catering director to hold a baccalaureate degree in a specific academic discipline. None of the authors of the letters stated that their company regularly hires only catering directors with a baccalaureate degree in a specific field. 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 Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The AAO notes that the letters state that “a bachelor’s degree or the comparable experience” is necessary for the proposed position. In determining whether a position qualifies as a specialty occupation, CIS considers work educational equivalency only when a specific degree does not exist in an occupational field. *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000). Educational equivalency will not be considered here in determining whether the position is a specialty occupation as a baccalaureate degree in restaurant and food management, institutional food service management, and related disciplines are available at universities in the United States.

The submitted job postings do not represent organizations similar to the petitioner, as the petitioner has not demonstrated that the InterContinental Miami, The Fairmont Turnberry Isle Resort and Club, Cordua

Restaurants, Seminole Hard Rock Hotel and Casino, Aramark, and the University of Southern California are similar to it in size and scope.

To establish the second alternative prong 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 degree in a specific academic specialty. Based on the evidence of the beneficiary's job description, and the petitioner's support letters, brochure, and financial records, the proposed position is similar to the *Handbook's* description of a food service manager, which is an occupation that does not normally require a baccalaureate degree in a specific academic discipline. Accordingly, the petitioner has not established the second alternative prong at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The proposed position is newly created. Thus, the record cannot establish the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which is that the petitioner normally requires a degree or its equivalent for the position.

To satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), the petitioner must 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. In light of the evidence of record, the beneficiary's job description, and the petitioner's support letters, brochure, and financial records, the AAO finds that the proposed duties are indistinguishable from those of a food service manager, which is an occupation that the *Handbook* indicates does not require a baccalaureate degree in a specific academic discipline. Accordingly, the petitioner fails to establish that the beneficiary's duties are so complex and specialized as to require the knowledge usually associated with the attainment of a baccalaureate or higher degree, which is the criterion at 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.