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**U.S. Citizenship
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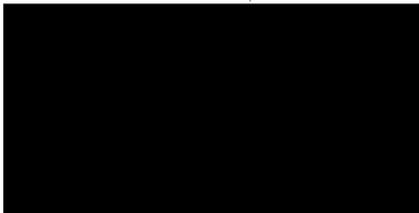


FILE: EAC 05 128 52266 Office: VERMONT SERVICE CENTER Date: **MAY 16 2007**

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.

for
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 operates a restaurant. It seeks to employ the beneficiary as a restaurant manager. Accordingly, 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 record of proceeding before the AAO contains: (1) the April 1, 2005 Form I-129 and supporting documentation; (2) the director's May 16, 2005 request for evidence (RFE); (3) counsel's August 8, 2005 response to the director's RFE; (4) the director's October 18, 2005 denial letter; (5) counsel's November 17, 2005 motion to reopen; (6) the director's January 25, 2006 dismissal of the motion to reopen; and (7) the Form I-290B and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

On October 18, 2005, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. On January 25, 2006, the director dismissed a motion to reopen affirming her prior decision. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

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.

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.

Although counsel referenced a "detailed job description," the initial submission did not include a description of the proffered position. In response to the director's request for further evidence, counsel submitted an undated letter from the petitioner describing the duties of the proffered position and letters from two other Irish restaurants.

The petitioner indicated that the proffered position of food services manager is divided into three components: oversight of the kitchen, oversight of the "front of the house," and administrative duties. The petitioner stated: the manager would spend 15 percent of his time overseeing kitchen operations, working closely with the executive chef to monitor food costs and approve ongoing menu innovations and seasonal adjustments, as well as overseeing the kitchen staff and spot-checking inventory controls and regulations; the manager would spend 60 percent of his time overseeing the "front of the house," including responsibility for the overall operations and presentations, supervising 24 management and wait staff, and recruiting, hiring, and training staff; and, the manager would spend 15 percent of his time updating financial status and effective costing, consulting with accountants, overseeing the in-house bookkeeper and administrative clerk, and reviewing employment, payroll, and licensing regulations to ensure the staff complies with the applicable regulations.

The record before the director also contained: an undated letter from the proprietor of two Irish restaurants who indicated that management and senior management (of a restaurant) must have a degree in a relevant discipline and applicable experience and that he would not hire management staff with less; and a second undated letter from the proprietor of two restaurants, each with 40 to 50 employees, and each with a gross of 3 million to 3.5 million in income, who indicated that he only employed management staff with a minimum of a bachelor's degree or equivalent in hotel and catering management and that the duties of the petitioner's position correlated with his manager's duties and responsibilities.

On October 18, 2005, the director denied the petition determining that the 2002-2003 edition of the Department of Labor's *Occupational Outlook Handbook (Handbook)* did not report that a bachelor's degree was required for the occupation of a restaurant manager. The director also determined that the petitioner's business did not correspond to the businesses owned by the letter-writers who indicated that a bachelor's degree would be required for the position of restaurant manager and thus did not demonstrate that a bachelor's

degree is common to the industry in parallel positions among similar organizations. The director further determined that the petitioner had not established an employment policy or practice of hiring only individuals who possess a bachelor's degree in a specific specialty for the proffered position or that the duties of the proffered position would be so specialized that a bachelor's degree would be required to perform them.

On January 25, 2006, the director affirmed her decision upon determining that the petitioner had not presented new facts or provided reasons for reconsideration. The director dismissed the motion to reopen.

On appeal, counsel for the petitioner asserts that the proffered position is highly complex and that the title "manager" can refer to a wide-range of skill levels including those necessary to operate a fast food chain operation or to operate an independent high-end establishment in a competitive market with the attendant complex duties. Counsel asserts that the nature of the petitioner, an Irish restaurant/pub in the Washington-Baltimore area, requires that the individual in the proffered position have a broad awareness of current events and Irish culture to interact with the patrons. Counsel claims it is skills such as these that are attained through a four-year degree providing the necessary foundation for the position. Counsel asserts that overseeing the kitchen staff and working with the executive chef who holds a bachelor's degree in culinary management, reporting to the manager on the restaurant's financial status and in effect acting as the restaurant's on-duty comptroller, as well as handling the "front of the house" shows the manager's position is complex requiring a college degree and advanced business skills.

Counsel contends that the *Handbook* reinforces the petitioner's distinction between fast food or high-end centralized restaurant operations and the independent high-end operations in which managers are vested with complex and vast responsibilities. Counsel avers that the director failed to consider the marketing and community/public relation duties inherent in the proffered position, functions that are critical to the success of *bona fide* Irish restaurants and pubs in the Baltimore/Washington market.

Counsel notes that the petitioner does not have an extensive hiring history, as it is a start-up operation. Counsel claims however, that every permanent manager the petitioner has hired has had a four-year degree or its equivalent. Counsel states that the general manager has 20 years of experience, the executive chef holds a bachelor's of arts in culinary management, and the other managers have bachelor's degrees in hotel or hospitality management.

Counsel submits three letters and copies of nine job announcements to establish that it is the common industry standard to hire managers with four-year degrees. The first letter, undated, authored by the director of human resources of the Jurys Doyle Hotel Group indicates that its Washington and Boston hotels operate a high-end restaurant and Irish pub. The author opines that managers of higher-end establishments need a more advanced, college-level education and training to oversee complex, multi-million dollar business operations that require knowledge and experience in the hospitality market as well as advanced business and marketing skills to successfully compete.

The second and third letters had initially been submitted in response to the director's RFE and were expanded and resubmitted on motion. The second letter, dated December 13, 2005, authored by the proprietor of two Irish restaurants in the Washington/Baltimore area and a restaurant consulting company states that his managers have two major areas of responsibility, business administration and community liaison, and that the

operation of those "entities" requires a baccalaureate degree or its equivalent. The author of this December 13, 2005 letter lists duties similar to those described by the petitioner for the proffered position and states that management and senior management must, as a minimum, have a baccalaureate degree in a relevant discipline and applicable experience and that he will not hire management staff with less. A third letter, also dated December 13, 2005, authored by the proprietor of several Irish pubs/restaurants, indicates that he employs management staff with, as a minimum, a bachelor's degree in hotel and catering management or a similar discipline, and that the dictates of a mid/high-end authentic Irish pub/restaurant would employ no less. Counsel notes the director's indication that the petitioner's business did not correspond to the businesses owned by the second and third letter-writers and takes issue with the director's implicit assumption that the petitioner is not of a similar size to the more established businesses.

In addition to the three letters submitted on appeal, counsel provides copies of nine job announcements for: (1) a restaurant manager for a Cincinnati restaurant that requires its manager to have a college degree with no field of study specified; (2) a general manager of a fine dining restaurant, catering, and café business that requires its general manager to have a bachelor's degree or equivalent experience but does not specify a particular field of study; (3) a hotel and assistant hotel manager of a cruise line that requires a bachelor's degree in hospitality or related field from a four-year college or university; (4) a restaurant manager for Universal Orlando fine dining food services that prefers a bachelor's degree in hospitality or business; (5) an assistant catering manager for a general hospital that lists a college degree with one to two years supervisory experience but does not indicate whether this is required or preferred; (6) an assistant food and beverage manager for a country club seeking an individual with club experience and a four-year degree in an unspecified discipline; (7) a restaurant manager for a fine dining establishment in Madison Square Garden, for which position the job announcement lists a bachelor's degree in the education field but does not indicate if the degree is preferred or required; (8) a dining room manager at a catering and conference center that indicates the ideal candidate will possess a bachelor's degree in hospitality management or related discipline; and (9) a restaurant manager for Lawry's restaurants that indicates the ideal candidate will have a college degree with restaurant experience.

Counsel asserts the evidence submitted establishes that the proffered position is a specialty occupation pursuant to each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Counsel's assertions are not persuasive. The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The 2006-2007 edition of the *Handbook* states the following with regard to the employment of food service managers, the position that mostly closely resembles the duties of the proffered position:

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.

The *Handbook* continues:

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.

The *Handbook* reports that the educational requirements for a position as a food service manager varies. The *Handbook* indicates:

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 services workers.

The *Handbook* also recognizes: "[a] bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation," and "[f]or 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."

The AAO observes that the *Handbook* does not specifically discuss management positions at independently owned high-end restaurants but does provide a general understanding of the educational requirements for an individual to perform the duties of a restaurant manager. The AAO concurs with the director's determination that the *Handbook* does not include discussion indicating that a bachelor's degree or its equivalent in a specific discipline is a requirement to perform the duties of this occupation. Accordingly, the petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the position of a restaurant manager. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

To establish the first prong of the second criterion, that a specific degree requirement is common to the industry in parallel positions among similar organizations, counsel has submitted three industry letters and nine job postings for positions including titles of restaurant manager, general manager of a restaurant, hotel manager, assistant catering manager, assistant food and beverage manager, and dining room manager. In each of the three letters, the authors offer their opinions that a high-end restaurant or an Irish restaurant/pub requires a more advanced, college-level education and training to oversee its business operations. Only one of the letter-writers, however, indicates that the bachelor's degree should be in hotel and catering management or a similar discipline. As observed above, to establish an occupation as a specialty occupation, the petitioner

must establish that the occupation requires a bachelor's degree in specific discipline; a requirement of a general degree is insufficient to establish a position as a specialty occupation. Moreover, although the letter-writers indicate that they hire or have hired individuals with bachelor's degrees for their management positions, the record does not contain documentary evidence substantiating their claims. These letters are insufficient to show an industry-wide standard that requires a bachelor's degree in a specific discipline to manage or participate in the management of a restaurant.

Likewise, the majority of job announcements submitted do not indicate that a bachelor's degree in a specific discipline is required to obtain the various management positions advertised in the restaurant, hotel, or country club industry. Only one out of nine job announcements indicates that a bachelor's degree in hospitality is required, and the position advertised is for a hotel and assistant hotel manager for a cruise line, an organization dissimilar to the petitioner; two of the nine job announcements indicate that a bachelor's degree in hospitality is preferred or that the ideal candidate will have a bachelor's degree in hospitality, but do not state that the degree is required; and the remainder of the advertisements note that a bachelor's degree is either required or preferred but do not identify a specific field of study as necessary to obtain the advertised position. In addition, the petitioner has not provided evidence to establish that it is comparable to the various entities advertising or that the positions are parallel to the proffered position. The job announcements provided do not establish that a degree requirement is common to the industry in parallel positions among similar organizations.

The petitioner has not established the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner has also failed to establish the second prong of the second criterion. The record does not contain evidence that shows that the proffered position is so complex or unique that only an individual with a degree can perform the position. The AAO acknowledges counsel's assertion that the individual in the proffered position must have a broad awareness of current events and Irish culture to interact with patrons and that the authors of the three letters submitted also imply that the "front of the house" operations of an Irish restaurant or an independent higher-end restaurant require a more advanced, college-level education and training to properly perform the duties of a manager. The AAO finds, however, that the duties of a manager interacting with patrons or otherwise performing the business operations of an Irish pub/restaurant, are not complex or unique duties, but rather are duties common to the management duties of many restaurants. The petitioner has failed to distinguish the proffered position from that of a position that is routinely performed by non-degreed restaurant managers. The petitioner has, accordingly, failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a degree or its equivalent for the position. Counsel's claim that the petitioner only hires permanent managers that have a four-year degree or its equivalent is not supported in the record. The petitioner does not provide evidence that the general manager, for example has a degree in a specific discipline or that his experience in the industry is equivalent to a four-year course of study in a specific discipline related to the duties of the position. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Neither does the record contain copies of other permanent manager's diplomas or evidence that the referenced employees' degrees are in specific disciplines that relate directly to their positions. Going on record without supporting documentary evidence is not sufficient for purposes 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)). Moreover, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. See *Defensor v. Meissner*, 201 F. 3d at 384. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The duties of the proffered position do not exceed the scope of those performed by a food service manager, an occupation that does not normally require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), 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. The *Handbook* reveals that the occupation of a food service manager is an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. The petitioner has provided a general description of the duties associated with the proffered position and has not detailed or offered documentary evidence to substantiate that the nature of the duties is specialized and complex, beyond the routine duties of a food service manager. Accordingly, the petitioner has not proved that the position is a specialty occupation pursuant to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petition will be denied and the appeal dismissed for the above stated reason. 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.