

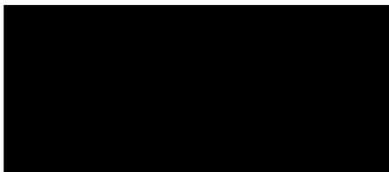
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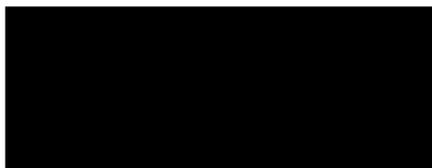
*Dz*

FILE: EAC 05 212 50791 Office: VERMONT SERVICE CENTER Date: **OCT 04 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 Michael T. Kelly*  
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 owns and operates a full-service Thai restaurant.<sup>1</sup> It seeks to employ the beneficiary as its general manager. 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.

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) counsel's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the 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 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:

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<sup>1</sup> An Internet search on August 28, 2007 of the Virginia State Corporation Commission of the Commonwealth of Virginia website at <http://s0302.vita.virginia.gov/servlet/resqportal> finds that the petitioner's status has been terminated.

- (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) consistently 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 (5<sup>th</sup> 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 seeks the beneficiary's services as its general manager. Evidence of the beneficiary's duties includes: the petitioner's July 14, 2005 letter in support of the petition and counsel's January 3, 2006 response to the director's request for evidence. As stated by the petitioner, the proposed duties are as follows:

Direct and coordinate activities concerned with pricing and sales of products. Manage staff, prepare work schedules, and assign specific duties. Review financial statements, sales and activity reports, and performance data to measure productivity and goal achievement and to determine areas needing cost reduction and program improvement. Determine staffing requirements, and interview, hire, and train new employees.

The director found that the proposed general manager duties do not require a bachelor's degree. Citing the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*, the director noted that the minimum requirement for entry into the position was not a baccalaureate degree or its equivalent in a specific

specialty. The director concluded 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 states, in part, that the petitioner is an upscale dining establishment and thus the proffered general manager position requires a bachelor's degree in management or a related field. Counsel cites the DOL's *O\*Net* to state that most employers require a bachelor's degree for the proffered position. Counsel also states that the record contains an expert opinion and job postings as supporting documentation.

Preliminarily, the AAO disagrees with counsel's interpretation of the *O\*Net* and its applicability to a determination that a position is a specialty occupation. The AAO does not consider the *O\*Net* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. *O\*Net* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The *O\*Net* ratings are meant to indicate the total number of years of vocational preparation required for a particular occupation and does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require.

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 routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with counsel that the proffered position is a specialty occupation. The *Handbook*, 2006-07 edition, 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 *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. The variety of paths available to enter into a restaurant manager position precludes the conclusion that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position. 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).

The record contains an opinion letter, dated October 31, 2005, from a university professor, who opines that at least a bachelor's degree or its equivalent in hospitality management, business management, or a related field from an accredited institution of higher education in the United States is considered a standard requirement in the industry for general manager positions. The author, however, does not indicate that he interviewed the beneficiary or the petitioner. Nor does he relate any personal observations of the petitioner's operations or of the work that the beneficiary would perform. Moreover, the author does not explain why his opinion, which appears contrary to the *Handbook's* report on this occupation, should be given greater weight than that of the *Handbook*. The *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation or from websites, published training materials and interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. The opinion of the October 31, 2005 author is insufficient to overcome the *Handbook's* finding that a bachelor's degree or its equivalent in a specific discipline is not a requirement to perform the duties of this occupation. 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).

Regarding parallel positions in the petitioner's industry, counsel submits 9 Internet job postings for restaurant managers. Only one of the postings, however, requires a bachelor's degree in a specific specialty. The majority of the postings specify a preference for a bachelor's degree without stipulating any specific specialty. Moreover, the postings do not indicate that the businesses publishing the advertisements are similar to the petitioner in size, number of employees, or level of revenue. Thus, the postings do not establish that a degree requirement is common to the industry in parallel positions among similar organizations.

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. The AAO acknowledges counsel's assertion that the petitioner is not just a restaurant, but rather is an upscale dining establishment and thus requires a related bachelor's degree for its general manager position, and the professor's assertion that the complexity of the proffered position is multifaceted and thus requires a related bachelor's degree. The AAO, however, finds that the proposed duties of a general manager performing the business operations of a Thai restaurant are not unique from or more complex than 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. Accordingly, the petitioner has failed to establish either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO now turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. In his January 3, 2006 response to the RFE, counsel states that the proffered position is a new position. The evidence of record thus does not establish this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(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.

Counsel states, on appeal, that the beneficiary's responsibilities - which entail directing and coordinating pricing and sales activities, managing staff and preparing work schedules, reviewing financial statements and sales and activity reports to determine areas needing cost reduction improvement, and establishing and implementing policies, goals, objectives, and procedures - are so complex as to require a related bachelor's degree. The information in the record about the proposed duties, however, does not establish that they exceed in scope, specialization, or complexity those usually performed by food service managers, an occupational category for which the *Handbook* indicates no requirement for or usual association with a baccalaureate or higher degree in a specific specialty. Regarding the proposed duties that relate specifically to knowledge of the Thai language, the petitioner has not demonstrated that these activities elevate the complexity of the proffered position to require a bachelor's degree in a specific specialty. It is further noted that, although information on the petitioner reflects that the petitioner has 6 employees and a gross annual income of \$500,000, the record does not contain any corroborating evidence in support of these claims, such as quarterly wage reports and federal income tax returns. 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)).

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Therefore, the evidence does not establish that the proffered position is a specialty occupation under 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.

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.