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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
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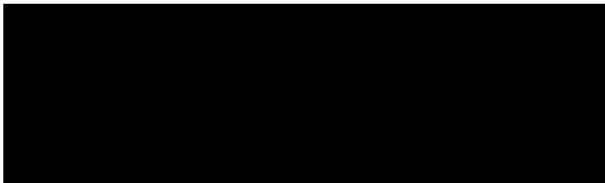


FILE: EAC 07 155 53198 Office: VERMONT SERVICE CENTER Date: FEB 20 2010

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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)

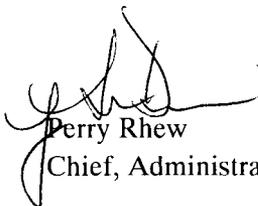
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and affirmed his decision in a subsequent motion to reopen. 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 grocery store and an Indian restaurant and catering business. On the Form I-129, Petition for a Nonimmigrant Worker, the petitioner states that it was established in 1996, that it employs 12 persons, and that it has a gross annual income of \$1,322,103. It seeks to employ the beneficiary as a food consultant. 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).

On April 11, 2008, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation. The petitioner filed a motion to reopen and upon review of the motion, the director re-opened the matter but ultimately denied the petition on September 11, 2008, again determining that the proffered position is a specialty occupation. The director also noted that the petitioner had previously filed a similar petition on behalf of the same beneficiary which had been denied, appealed and the appeal dismissed by the AAO. On appeal in this matter, counsel for the petitioner submits a Form I-290B, Notice of Appeal, brief, and previously submitted documentation.

The record includes: (1) the Form I-129 and supporting documentation filed April 18, 2007; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (4) the director's denial decision; (5) the petitioner's motion; (6) the director's second denial decision; and (7) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing its decision.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly

specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [1] 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 [2] 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 also 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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

To determine whether a particular job qualifies as a specialty occupation, United States Citizenship and Immigration Services (USCIS) 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. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Defensor v. Meissner*, 201 F. 3d 384. 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently 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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such professions. These occupations all require a baccalaureate degree in the specific specialty as a minimum for entry into the occupation and fairly represent the types of professions that Congress contemplated when it created the H-1B visa category.

On the Form I-129, the petitioner stated that the proffered position is that of a "Food Consultant." In the petitioner's March 14, 2007 letter appended to the petition, the petitioner indicated that it is a specialty Indian restaurant which provides sit down and catering services. The petitioner stated that the beneficiary would perform duties as follows:

- [R]esearch the best suppliers in terms of quality and pricing of products;
- [K]eep inventory of supplies and products and prepare purchase orders;
- [C]oordinate deliveries;
- [M]easure and evaluate service standards by using various feedback tools;
- [D]evelop and implement strategies for continuous service improvement and competitiveness;
- [M]aintain on-going sales skills and enhance product knowledge development of front-of-the-house personnel;
- [D]evelop merchandising, promotions and advertising with our management;
- [E]nsure that personnel follow food safety and sanitation regulations.

The petitioner stated further that the beneficiary's duties would rise above that of a typical chef in that he would be charged with the leadership of the whole kitchen as well as with the acquisition of new products, marketing, and health and sanitation. The petitioner noted that the beneficiary would be required to keep abreast of market trends, that he would decide what to sell and how it is prepared, and that his duties would involve all of the behind-the-scenes work. The petitioner noted further that its food consultant:

[I]s called upon to exercise judgment on complex problems, to communicate, to analyze, to understand mathematical and financial data, to commit to long range planning and monitoring, to act in a reliable and professional manner, and to interpret

a broad range of documents, data, and instructions that [are] in mathematical, diagrammatic, and abstract forms.

In a September 13, 2007 response to the director's RFE, the petitioner noted that it is a major operation that caters to a wide variety of niche customer tastes and that as it has grown "it needs a well-trained consultant that dedicates his or her full time to the provision of new and exciting goods and foods." The petitioner noted that it was involved in a large scale expansion and provided a copy of a new lease and new floor plan for the proposed store. The petitioner further indicated that it needed a qualified individual to "take the lead in determining what products will be sold, how they will be prepared, marketed, etc., and how often they will be rotated in and out of the business." The petitioner noted that it did not need more chefs or cooks or store clerks but needed people who could adapt to the changing market and put on promotions and encourage customers to try new things. The petitioner emphasized that the beneficiary would research matters including suppliers, competitors, customer complaints and compliments, and food prices; he would draft reports and make changes to the product line, and would act in a supervisory role. The petitioner explained further that the beneficiary would oversee lower level workers and make specific changes to the food and product line as well as the manner in which the various services are provided.

As noted above, the director denied the petition determining that the petitioner had not established that the proffered position is a specialty occupation.

On motion, counsel for the petitioner asserted that the skills required to perform the duties of the proffered position require the ability to make rational analysis and exercise judgment on complex problems and that a qualified food consultant must be able to understand mathematical and financial data because documents and various instructions often appear in such format. Counsel contended that the petitioner needs the reliability and complex comprehension of somebody with a college degree, given the fact that the petitioner's reputation and revenue depend on the consistency and quality of the products it sells. Counsel also asserted that the petitioner employs two individuals who have bachelor's degrees and referenced the petitioner's May 7, 2008 letter advising that its current employee in the food consultant position has a bachelor's degree in molecular biology, a bachelor's degree in business administration, as well as a master's degree in business administration. The petitioner also noted that its office manager has a bachelor's degree in marketing. Counsel also contended that the proffered position is similar to a management consulting position as described in the Department of Labor's *Occupational Outlook Handbook (Handbook)*.

Again, as noted above, the director denied the petition, determining that the record did not establish that the proffered position is a specialty occupation.

On appeal, counsel asserts that the proffered position involves food service management and consulting and that the Department of Labor's *Bureau of Labor Statistics* indicates that about 74 percent of workers in the management, scientific, and technical consulting services field have a bachelor's or higher degree and that 60 percent of the jobs are in managerial, business, financial, and professional occupations. Counsel also contends that because the petitioner requires a bachelor's degree or higher for equivalent positions the position qualifies as a specialty occupation pursuant to the criterion set out at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Upon review of the petitioner's description of duties and the nature of the petitioner's business, the AAO does not find that the proffered position is a specialty occupation. The AAO routinely consults the *Handbook* for information about the duties and educational requirements of particular occupations in an effort to determine whether a baccalaureate or higher degree, or its equivalent, in a specific speciality is the normal minimum requirement for entry into the particular position and thus satisfies the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

In this matter, the AAO finds that the description of duties of the proffered position most closely resembles the occupation of a food service manager. The *Handbook* states the following with regard to the employment of food service managers:

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's equipment and facilities. Managers are generally responsible for all administrative and human-resource functions of the business, including recruiting new employees and monitoring employee performance and training.

* * *

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality and 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, 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.

* * *

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.

Regarding the education and training of food service managers, the *Handbook* reports:

Most food service managers have less than a bachelor's degree; however, some postsecondary education, including a college degree, is increasingly preferred for many food service manager positions. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality or food service management programs, which require internships and real-life experience to graduate. While these specialized degrees are often preferred, graduates with degrees in other fields who have demonstrated experience, interest, and aptitude are also recruited.

* * *

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.

The petitioner has not provided any substantiating evidence that establishes that the proffered position includes duties other than those generally stated in the *Handbook's* description of a food service manager. The *Handbook* clearly indicates that a food service manager position is not a position that requires a bachelor's or higher degree in a specific discipline in order to perform the duties of the position.

The AAO notes counsel's reference to the Department of Labor's *Bureau of Labor Statistics Career Guide to Industries* and the discussion of the topic of management, scientific, and technical consulting services. However, the information provided relates to the nature of a certain type of industry, that of management, scientific and technical consulting firms, it does not relate to a specific occupation in a restaurant/catering/store. In addition, the AAO does not find that the labor statistics provided demonstrate that a particular occupation within the petitioner's industry requires a bachelor's or higher degrees in a specific discipline; rather the labor statistics generally reference bachelor's degrees in no particular discipline or bachelor's degrees in a variety of disciplines. The

AAO does not find that the information regarding the management, scientific, and technical consulting services applicable to the proffered position or the petitioner's particular business.

As there are a variety of ways to enter into the proffered position's profession, other than a four-year degree in a specific discipline, the petitioner has not established the requisite requirement that a four-year degree in a specific discipline is the normal minimum requirement to enter into a position. The petitioner has not established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

The AAO next considers the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), whether a degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, 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 *Handbook* reports 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)). As discussed above, the *Handbook* does not report that the petitioner's industry normally requires a bachelor's or higher degree for the position of a food service manager. The petitioner has not otherwise provided evidence of an industry standard for parallel positions among similar organizations.

In the alternative, the petitioner may show that the proffered position is so complex or unique that only an individual with a degree will be able to perform the work associated with the position. In the instant petition, the petitioner has not submitted sufficient documentation to distinguish the proffered position from similar but non-degreed employment. The AAO is not persuaded that the nature of the specific duties of the proposed position is more specialized and complex than that of a typical food service manager, an occupation that is not a specialty occupation.

A review of the evidence of record finds the evidence insufficient to establish the proposed duties as a position that is identifiable with an industry-wide educational standard or distinguishable, by its unique nature or complexity, from similar but non-degree-requiring positions. The petitioner has failed to establish the proffered position as a specialty occupation under either prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner indicates that its current food consultant holds a bachelor's degree in biology and business and a master's of business administration. The petitioner claims that it needs the individual in the proffered position to hold a bachelor's degree and that the beneficiary's education and experience qualify him for the position. However, it is not the education and experience of a particular individual that makes a position a specialty occupation. The petitioner's desire to employ an individual with a bachelor's degree also does not establish that the position is a specialty occupation. The critical element is not the title of the position or 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. To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a

petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a non-professional or non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. Accordingly, the AAO finds that proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO finds that the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. In assessing whether the petitioner has met its burden with regard to this criterion, the AAO considers the duties of the particular position, not the occupation, or the industry-wide standard associated with the occupation. The AAO acknowledges counsel and the petitioner's claims that the position requires the ability to make rational analysis and exercise judgment on complex problems and that a qualified food consultant must be able to understand mathematical and financial data because documents and various instructions often appear in such a format. However, the petitioner has not substantiated that these duties are more complex or specialized than the duties of a general food service manager who must also make these judgments and understand documents and instructions; duties that are not associated with a bachelor's degree in a specific specialty. Neither does the position, as described, represent a combination of jobs that would require the beneficiary to have a unique set of skills beyond those of a typical food service manager.

Upon review of the totality of the record, the petitioner has not provided evidence that the proffered position is a specialty occupation. 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.