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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W. MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



D2

FILE: EAC 09 138 50238 Office: VERMONT SERVICE CENTER Date: APR 01 2011

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director 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. To employ the beneficiary in what it designates as a Food Service Manager (General Manager) position, the petitioner endeavors to classify her 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 failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

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 a particular position 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.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (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 occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its

equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

With the visa petition, counsel submitted a letter, dated April 1, 2009, from the petitioner's owner. That letter contains the following description of the duties of the proffered position:

[In the proffered position, the beneficiary] will executive annual financial, marketing guest service and human resources objectives, strategies and tactics for the restaurant as defined by the current company standard operating procedures (SOP) and the restaurant's current operations plan; develop and maintain professional working relationships with restaurant hourly employees; manage restaurant floors, focusing on regular contacts with guests; handling guest complaints in a professional and timely manner, making sure that the frequency of complaints is within acceptable limits; ensure that employee requirement and training, operations, food safety and security practices are in compliance with SOP in these areas; implement Craft Training program for all hourly employees to improve unit operations and guest experience; carry supervisory duties such as recruitment, hire, train, direct workflow, appraise performance, reward and discipline employees and resolve complaints and problems; complete all required reports and paperwork accurately and on time; maintain personal files with appropriate employment and legal documents.

[Verbatim from the original.]

The petitioner's owner added, "This position is a demanding one requiring the skills of a professional with at least a Bachelor's degree in Hospitality and Tourism Management or its equivalent."

Counsel also submitted evidence that the beneficiary has a bachelor's degree in chemistry awarded in Mongolia, and a master's degree in hospitality and tourism management awarded by the University of Central Florida.

Because the evidence did not demonstrate that the visa petition was approvable, the service center, on May 5, 2009, issued a RFE in this matter. The service center requested, *inter alia*, evidence that the proffered position qualifies as a position in a specialty occupation.

In a response dated May 28, 2009, counsel stated that the beneficiary's master's degree renders her "optimally qualified" to run a restaurant. Counsel described some of the classes the beneficiary took pertinent to the hospitality industry. Counsel asserted, "[The beneficiary's] specialized studies and related internship will enable her to better approach all aspects of the business than a peer professional without her core of academic achievement." Counsel provided documents pertinent to the company that franchises the petitioner's restaurant and evidence pertinent to the beneficiary's education.

Counsel implied that the knowledge necessary to perform the duties of the proffered position can only be gained through academic study, but provided no evidence to support that assertion. The

assertions of counsel are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

The director denied the visa petition on June 16, 2009 finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation.

On appeal, counsel provided an evaluation, dated July 13, 2009, from the department head of the Department of Hospitality and Tourism Management of Purdue University. The evaluation reiterated the duties of the proffered position as stated by the petitioner's owner, but with some amendments. That evaluation also states:

It is apparent that a Food Service Manager (General Manager) with the specific duties listed below would be considered a professional position and would normally be filled by a graduate with a minimum of a Bachelor's Degree in Hospitality Management or a related area. Such a requirement is necessary in that a college graduate obtains specific knowledge for the complex responsibilities of this position during an undergraduate or graduate program leading to such a degree. Completion of a Bachelor's Degree program in Hospitality Management or a related area provides the student with the specialized knowledge required to properly manage the restaurant, and directly prepares the graduate for the challenging tasks of the position.

In a brief submitted to supplement the appeal, counsel observed that the petitioner is a franchisee, and stated that the operation of the petitioner's restaurant is governed by the standard operating procedures of the parent company. He stated:

As the General Manager of this operation, this position is different from an individually owned restaurant operation because [the beneficiary's] duties involve applying theoretical knowledge of business administration that can only be acquired through academic training.

The AAO notes that neither of the beneficiary's degrees is in business administration.

Counsel also cited the *O*Net Online* Internet site, which addresses Food Service Managers under the Standard Occupational Classification code of the U.S. Department of Labor (DOL) of 11-9051.00. Counsel stated that the duties described for those positions demonstrate that they require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO notes that *O*Net Online* categorizes Food Service Managers in Job Zone Three, which indicates that those positions require medium preparation. It further states, "Most occupations in this zone require training in vocational schools, related on-the-job experience, or an associate's degree." *O*Net Online* does not support the proposition that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

In any event, the AAO recognizes the DOL's *Occupational Outlook Handbook (Handbook)* as the more authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook* describes the educational requirements of food service manager positions as follows:

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.

The *Handbook* also fails to support the petitioner's position that food service manager positions position require a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether 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)).

The *Handbook*, as was observed above, does not support the assertion that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence that any professional association of financial analysts requires a minimum of a bachelor's degree or the equivalent in a specific specialty for admission. Counsel provided no letters from firms or individuals in the food service industry attesting that they routinely recruit and employ only food service managers with a minimum of a bachelor's degree or the equivalent in a specific specialty. Counsel provided no vacancy announcements to support that assertion. In short, the

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online, accessed January 24, 2011.

record contains no evidence to support the assertion that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which would be satisfied if the petitioner demonstrated that, notwithstanding that food service manager positions in general may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular proffered position in the instant case is so complex or unique that it can only be performed by an individual with a such a degree.

As to the duties of food service managers, the *Handbook* states:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant'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.

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

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

The duties attributed to the proffered position are entirely consistent with those described for generic food service managers. Counsel asserted that the duties of the proffered position are more complex than those of other food service managers because they must be performed in accordance with the standard operating procedures of the parent company. The AAO finds, however, that the provision of instructions by the parent company renders the duties of the proffered position easier to perform, rather than more difficult, if it has any effect at all.

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position qualifies as a specialty occupation pursuant to the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence of a previous history of recruiting and hiring to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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.

The evaluation submitted states that the duties of the proffered position require a minimum of a bachelor's degree or the equivalent in hospitality management or a related area. That evaluation is not probative.

First, that evaluation is conclusory; it contains no evidence that it was based on scholarly research conducted by the evaluator in the specific area upon which he is opining. Although the professor is credited with numerous scholarly publications, there is no indication that he has published any work pertinent to the hospitality industry's educational requirements for food service managers, and no indication of recognition by professional organizations as an authority on those requirements. As the professor has not established his credentials as an expert on industry hiring standards, his opinion in

this area merits no special weight. Further, it is manifestly outweighed by the information in the *Handbook*, which the professor failed to address.

Further, the record does not indicate that the evaluator has adequate knowledge of the particular position at issue here. The evaluation suggests that the professor's knowledge of the specific position offered by the petitioner is limited to the description of its duties provided by the petitioner's owner. There is no evidence that the professor has visited the petitioner's business site, observed the petitioner's food and beverage supervisors, interviewed them about the nature of their work, or documented the knowledge that they apply on the job.

The description of the duties of the proffered position on which the evaluator relies describes the duties in exclusively general and generic terms that reveal nothing about the actual work that the beneficiary would perform within the context of this particular petitioner's business; and the professor does not demonstrate knowledge of the petitioner's particular business operations. He does not relate any personal observations of those operations or of the work that the beneficiary would perform.

In short, the evaluator's opinion is not as reliable or persuasive as the *Handbook's* information which is based upon the DOL's extensive labor market research. USCIS may, in its discretion, use as advisory opinions submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Again, as was noted above, the duties described are generic food service manager duties. The petitioner has not, therefore, demonstrated that 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. The petitioner has not, therefore, demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.