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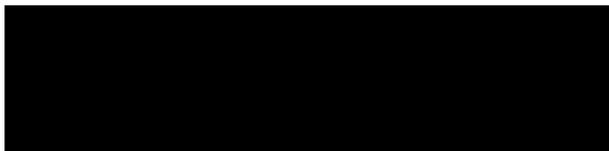
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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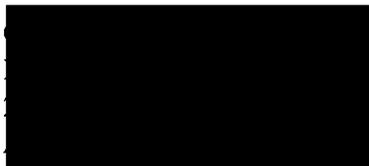


Date: **JUL 07 2011** Office: VERMONT SERVICE CENTER FILE:

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:

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,

Perry Rhew
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, and seeks to employ the beneficiary as its restaurant manager. 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 director denied the petition, finding that the proffered position was not a specialty occupation. On appeal, counsel for the petitioner contends that the director's findings were erroneous, and submits a brief and additional evidence in support of this contention.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii):

Specialty occupation means an occupation which requires [1] 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 [2] 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 at 387. 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.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director’s request for additional evidence (RFE); (3) the petitioner’s response to the director’s RFE; (4) the director’s decision denying the petition; and (5) the petitioner’s Form I-290B and supporting documents. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner claims that it currently operates a Thai restaurant in Maryland and employs twelve persons. It claims that it requires the services of the beneficiary as restaurant manager, who will work closely with the owner and will manage all aspects of the restaurant from the kitchen to the dining room. According to the petitioner’s letter of support dated April 15, 2009, the specific duties of the proffered position would be as follows:

Some of the responsibility of the beneficiary will include: monitoring compliance with health and fire regulations regarding food preparation and serving, and maintenance in the dining room; monitoring food preparation methods, portion sizes, and garnishing and presentation of food to ensure that food is prepared and presented in an acceptable manner; counting money and making bank deposits; [i]nvestigating and resolving complaints regarding food quality, service, or accommodations; coordinating assignments of cooking personnel to ensure economical use of food and timely preparation, scheduling and receiving food and beverage deliveries, checking delivery contents to verify product quality and quantity, monitoring budgets and payroll records, and review financial transactions to ensure that expenditures are authorized and budgeted[;] maintaining food and equipment inventories, and keeping inventory records; scheduling staff hours and assigning duties; establishing standards for personnel performance and customer service.

The petitioner concluded by stating that the nature of the proffered position is specialized and requires special knowledge of management skills. Consequently, the petitioner states that it requires the candidate for the position to possess the equivalent to a bachelor's degree in business or management. In conclusion, the petitioner stated that one of the co-owners who would generally manage these functions has been diagnosed with cancer, and consequently the temporary services of the beneficiary are required to ensure the continued operation of the restaurant.

On April 27, 2009, the director issued an RFE, which requested a more detailed description of the work to be performed by the beneficiary. The director specifically requested information pertaining to the beneficiary's specific job duties and the percentage of time devoted to such duties, as well as an organizational chart demonstrating the composition of the petitioner's company.

In response, counsel for the petitioner submitted a letter dated June 3, 2009, and also submitted a letter from the petitioner dated March 30, 2009. Both of these letters emphasized the educational background of the beneficiary and listed the specific areas of coursework he has pursued. The petitioner claimed that the co-owner, who now is suffering from cancer, has thirty years of experience in the field but no specific degree, and thus wishes to employ a "professional manager" to handle business operations. Regarding the duties of the beneficiary, the petitioner provided the following updated chart:

% Time	Duties
15	monitoring compliance with health and fire regulations regarding food preparation and serving, and maintenance in the dining room
15	quality control and monitoring food preparation methods, portion sizes, and garnishing and presentation of food to ensure that food is prepared and presented in an acceptable manner
15	Create and Implement Marketing plan to facilitate growth of the business

10	Accounting of all assets and liabilities on a daily basis in conjunction with revenues and accounts payable
10	Personnel management; scheduling staff hours and assigning duties to ensure proper distribution of responsibilities
10	Using knowledge of economics and consumer behavior to determine and project future business in order to meet the supply demand of the restaurant
10	monitoring budgets and payroll records, and review financial transactions to ensure that expenditures are authorized and budgeted
5	maintaining food and equipment inventories, and keeping inventory records
5	establishing standards for personnel performance and customer service
5	Use computer generated data and models to determine business forecast

The petitioner also submitted two job vacancy announcements for positions that it contended were parallel to that of the proffered position in the petitioner's industry.

The director found, and the AAO concurs, that the proffered position of restaurant manager is not a specialty occupation position. Citing to 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 found further 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 for the petitioner contends that the director's decision was erroneous. Counsel contends that the proffered position is specialized since it requires the candidate to perform duties in numerous areas, including economics, marketing, computer systems, and accounting. Counsel contends that the petitioner has demonstrated that it requires a degree for the proffered position, and also relies on the submitted job postings as evidence that a degree requirement is common within the petitioner's industry for similar restaurant manager positions. Finally, counsel contends that the beneficiary is a "Certified Professional Food Manager" and is thus qualified to perform the duties of the position.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, it cannot be found that the proffered position is a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations. The AAO does not concur with the petitioner that the proffered position is a specialty occupation.

The AAO has reviewed the discussion of food service managers as described by the 2010-2011 edition of the *Handbook*, and agrees with the director's determination that the proffered position is akin to that of a food service manager. According to the *Handbook*, the duties of a food service manager are as follows:

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

Managers 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.

The *Handbook* continues:

Work environment. Many food service managers work long hours—12 to 15 per day, 50 or more per week, and sometimes 7 days a week. Such schedules are common for fine dining restaurants and those, such as fast-food restaurants, that operate extended hours. Managers of institutional food service facilities, such as school, factory, or office cafeterias, work more regular hours because the operating hours of these establishments usually conform to the operating hours of the business or facility they serve. However, many managers oversee multiple locations of a chain or franchise or may be called in on short notice, making hours unpredictable.

The work environment of a food service manager, as described by the *Handbook*, appears to correlate with the description of the proffered position.

With regard to the educational requirements of a food service manager, the *Handbook* states:

Education and training. 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* reports that food service managers do not require a bachelor's degree in a specific specialty. Accordingly, the petitioner has failed to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position.

Next, the AAO finds that the petitioner has not satisfied 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 response to the RFE, the petitioner submitted two vacancy postings advertised online by Saladworks and Falcon's Landing. These postings, however, are insufficient to establish the above criteria. First, the positing for Saladworks is identified as catering manager, not restaurant manager. Regardless, the job posting requires the candidate to simply possess a bachelor's degree, but does not require a degree in a specific specialty. Moreover, Saladworks describes itself as "the nation's first and largest fresh-tossed, custom-made salad chain." Since the petitioner is operating one Thai restaurant with only twelve employees, it cannot claim that Saladworks represents an organization similar in size and scope to the petitioner.

Likewise, the posting from Falcon's Landing is also deficient. According to the posting, Falcon's Landing is an Air Force Retirement Officers Community located in Northern Virginia. Although it requires the services of a restaurant manager, Falcon's Landing likewise cannot be considered an organization similar in size and scope to the petitioner. Additionally, the degree requirement for this position also requires simply a bachelor of arts, and does not state that a degree in a specific specialty is required. Therefore, the petitioner has failed to satisfy the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Under the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), the petitioner may submit evidence to establish that the duties of the position are so complex or unique that only an individual with a degree in a specific specialty can perform the duties associated with the position. The AAO observes that the petitioner has indicated that the beneficiary's educational background and experience in the industry, along with his certification as a professional food manager will assist him in carrying out the duties of the proffered position; however, the test to establish a position as a specialty occupation is not the skill set or education of a proposed beneficiary, but whether the position itself requires the theoretical and practical application of a body of highly specialized knowledge obtained by at least baccalaureate-level knowledge in a specialized area. The petitioner does not explain or clarify which of the duties, if any, of the proffered position are so complex or unique as to be distinguishable from those of similar but non-degreed employment. The petitioner

has thus 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 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. The petitioner claims that the restaurant has been managed by its co-owners in the past, and states that neither of the co-owners held a degree. Due to the illness of one of the co-owners, the petitioner contends that it now requires the services of a professional manager to oversee the restaurant's operations. As the petitioner acknowledges that it has not hired any degreed individuals to fill the position of restaurant manager in the past, the petitioner has not satisfied this criterion.

The petitioner claims that “all other restaurants I know of in the Washington DC area all have managers who have bachelor's degree[s].” Aside from the fact that the petitioner does not provide a documentary basis for this assertion,¹ this statement is not persuasive because the record does not document that the duties of the proffered position require a baccalaureate or higher level of education to perform them.

The AAO notes that while a petitioner may believe or otherwise assert that a proffered position requires a degree, that opinion alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS 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.

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

The petitioner has submitted no independent documentation, such as letters or expert testimony, in support of the contention that complex knowledge is required to perform the duties of the proffered position. Instead, the petitioner and counsel simply provide their own opinions with regard to the qualifications necessary for a restaurant manager/food service manager to successfully function in

¹ 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)). Further, 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).

the proffered position. As already noted in the footnote, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings, and the unsupported assertions of counsel do not constitute evidence.

Furthermore, the AAO finds that, to the extent that they are depicted in the record of proceeding, the duties do not appear so specialized and complex as to require highly specialized knowledge usually associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. Rather, the proposed duties as described in the record appear indistinguishable from those of the general range of food-service-manager positions for which the *Handbook* indicates no requirement for knowledge usually associated with at least a bachelor's degree, or the 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.