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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
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Services

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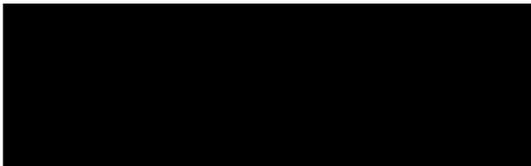
Date: **NOV 10 2011** Office: VERMONT SERVICE CENTER

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 remain denied.

The petitioner is a Thai Cuisine restaurant that was established in 1997, employs 10 personnel, and had a gross annual income of \$650,000 when the petition was filed. It seeks to employ the beneficiary as a restaurant manager 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 concluding that the petitioner failed to establish that the proffered position is 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 additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's denial letter; and (5) the Form I-290B, Notice of Appeal or Motion, and brief submitted by counsel. The AAO reviewed the record in its entirety before issuing its decision.

The primary issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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 one 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 [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 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.

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.

In this matter, the petitioner seeks the beneficiary’s services as a restaurant manager. In the petitioner’s March 27, 2009 letter in support of the petition, the petitioner stated the duties of the proffered position included:

- Overseeing the daily operation of the restaurant
- Handling all advertising and promotion of the restaurant
- Scheduling of all employees and promotion of the restaurant
- Finding and evaluating potential employees
- Finding creative ways to retain experienced workers
- Establishing opportunities for promoting the sales and growth of the restaurant
- Keeping up with new changes and developments in restaurant trends and the economy in general
- Finding suppliers that are able to supply us with the best quality food and at the least cost
- Checking and maintaining food and supply inventory; placing all inventory orders
- Solving problems related to customer satisfaction and employee needs
- Check on customers throughout the day
- Inspecting cleanliness and readiness before lunch and dinner hours
- Inspections and up to date study to make sure the restaurant conforms to all Health Department requirements
- Preparing payroll reports
- Preparing daily and monthly sales reports

In its support letter, the petitioner indicates that it requires its restaurant manager to possess at least a bachelor's degree since the position requires a certain level of maturity, responsibility and discipline.

On May 19, 2009, the director requested additional information from the petitioner to demonstrate that the proffered position is a specialty occupation and that the beneficiary was qualified to perform the duties of a specialty occupation.

In response to the director's request for evidence (RFE), counsel for the petitioner submitted the petitioner's analysis of the duties of the proffered position as those duties compared to the 1998 U.S. Office of Management and Budget's occupation classification system and the Department of Labor's *Occupational Information Network (O*NET)* regarding knowledge and skills required for particular occupations. The petitioner concluded that the proffered position compared to the *O*NET* information on food and service managers. The petitioner also referenced its survey of qualifications for food service managers for other organizations and noted that various Internet job sites revealed that a bachelor's degree is a common criterion for these positions. The petitioner listed 12 examples of job postings as well as provided copies of two advertisements. From the limited information in the examples provided, it is not possible to ascertain that the organizations are similar to the petitioner in income and size or that the positions are parallel to the proffered position. Moreover, most of the companies listed in the examples did not indicate that a bachelor's degree or higher in a specific discipline was required. Regarding the advertisements submitted, one of the advertisements indicated that a bachelor's degree was required and that all majors were accepted. The second advertisement noted that a four-year degree was beneficial. The petitioner also noted that it had previously employed three

individuals in the position of restaurant manager and each individual had the equivalent of a bachelor's degree in either restaurant management, business administration, or general management.

The petitioner also submitted a June 19, 2009 opinion letter prepared by [REDACTED] Ph.D., [REDACTED] State University. [REDACTED] notes that over the years he has become familiar with restaurants and companies that recruit graduates for the position of restaurant manager. He adds that having reviewed the petitioner's description of duties for its restaurant manager that this type of position is a typical job placement for students completing a bachelor's degree at the school. [REDACTED] opines: "these duties are specialized and require the theoretical and practical application of a body of highly specialized knowledge" and "require preparation at the Bachelor's Degree level at a minimum." The petitioner further provided an additional description of the duties of the proffered position that included the time the beneficiary would spend on each of the listed duties. The petitioner's organizational chart showed that the manager would supervise kitchen and floor staff.

Upon review, the director determined that the petitioner had not established that the proffered position qualified as a specialty occupation.

On appeal, counsel for the petitioner asserts that USCIS on at least two prior occasions reviewed and approved the petitioner's H-1B petitions for this same position. Counsel contends that the petitioner is not required to establish an industry-wide standard for a bachelor's degree but may establish that the proffered position is a specialty occupation pursuant to the second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), or 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) or (4). Counsel provides excerpts from previously filed and approved petitions for other individuals in the position of restaurant manager.

To make its determination whether the proffered position qualifies as a specialty occupation, the AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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)).

Upon review of the description of the proffered position's duties, the AAO agrees that the duties described correspond generally to the duties of a food service manager as set out in the *Handbook*. The chapter on the "Food Service Manager" occupational category is addressed in

the *Handbook* (2010-11 online edition).¹ In significant points regarding this occupation, the *Handbook* indicates: “Although most food service managers qualify for their position based on their restaurant-related experience, an increasing number of employers prefer managers with a 2- or 4-year degree in a related field.” Moreover in the segment on education and training, the *Handbook* provides:

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.

Handbook, 2010-11 ed., available at <http://www.bls.gov/oco/ocos144.htm> (last accessed November 2011).

Thus, a review of the *Handbook* finds no minimum requirement of a baccalaureate or higher degree in a specific specialty for employment in the proffered position as described. Rather, a restaurant managerial occupation accommodates a wide spectrum of educational credentials as well as offering a path to employment in the occupation based only on experience or a two-year degree.

As the duties of the proffered position described in the record of proceeding do not indicate that the particular position proffered in this petition is one for which a baccalaureate or higher degree or its equivalent in a specific specialty is normally the minimum, and as the petitioner did not indicate that the proffered position requires at least a bachelor’s degree or the equivalent in a *specific specialty*, the petitioner failed to satisfy the first criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

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.

Again, 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

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.

“routinely employ and recruit only degreed individuals.” See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As reflected in this decision’s discussions regarding the *Handbook*’s information, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement of at least a bachelor’s degree in a specific specialty. The AAO acknowledges the petitioner’s analysis of the proffered position as the duties relate to the knowledge and skills required for food service managers set out in the *O*NET*. However, 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. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It 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. Again, the record does not demonstrate that the occupation of food service manager would require the beneficiary to have attained a bachelor’s degree or its equivalent in a specific specialty.

Regarding the opinion letter prepared by [REDACTED] and submitted by the petitioner in response to the RFE, [REDACTED] does not list the reference materials on which he relies as a basis for his conclusion. It appears that [REDACTED] did not base his opinion on any objective evidence, but instead restates the proffered position description and states anecdotally that this type of position is a typical job placement for students completing a bachelor’s degree at the school. Moreover, [REDACTED] does not state that the duties of the proffered position may be performed only by those individuals who complete a precise and specific course of study but opines that restaurant managerial positions require preparation at a general bachelor’s degree level; thus, not requiring a bachelor’s degree or higher in a specific discipline. Since there must be a close correlation between the required specialized studies and the position, the requirement of a general bachelor’s degree, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm’r 1988). The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm’r 1988).

The two job-vacancy advertisements submitted by the petitioner are not probative in establishing the proffered position as a specialty occupation, as both advertisements require only a general bachelor’s degree and not a bachelor’s degree in a specific specialty. The petitioner’s reference to a dozen other job postings also fails to demonstrate what statistically valid inferences, if any, can be drawn with regard to determining the common educational requirements for entry into parallel positions in similar restaurant organizations. See generally Earl Babbie, *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. See *id.* at 195-196 (explaining that “[r]andom

selection is the key to [the] process [of probability sampling]” and that “random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error”). As such, even if the job announcements supported the finding that the position of restaurant manager for a ten-person restaurant required a bachelor’s or higher degree in a specific specialty or its equivalent, it cannot be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics which indicates that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

For the reasons discussed above, the petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Even though the petitioner and its counsel claim that the proffered position’s duties are so complex and unique that a bachelor’s degree is required, the petitioner failed to demonstrate how the restaurant manager duties described require the theoretical and practical application of a body of highly specialized knowledge such that a bachelor’s or higher degree in a specific specialty or its equivalent is required to perform them. To begin with and as discussed previously, the petitioner itself does not require at least a baccalaureate degree or its equivalent in a specific specialty. The evidence of record does not establish that this position is significantly different from other restaurant manager positions such that it refutes the *Handbook's* information to the effect that most employers do not require a bachelor’s degree and for those that do there is a spectrum of preferred degrees acceptable for restaurant manager positions, including degrees not in a specific specialty. In other words, the record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than restaurant managers or other closely related positions that can be performed by persons without at least a bachelor’s degree in a specific specialty or its equivalent. Consequently, as the petitioner fails to demonstrate how the proffered position of restaurant manager is so complex or unique relative to other restaurant manager positions that do not require at least a baccalaureate degree in a specific specialty or its equivalent for entry into the occupation in the United States, it cannot be concluded that the petitioner has satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the petitioner and counsel on appeal assert that the petitioner’s previously approved H-1B petitions for this same petition reflect USCIS’s conclusion that the proffered position is a specialty occupation. However, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. If any of the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, they would constitute material and gross error on the part of the director. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm’r 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), cert. denied, 485 U.S. 1008 (1988). A prior approval does not compel the approval of a subsequent petition or relieve the petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. Based upon the limited

information submitted regarding the previous approved H-1B petitions, the AAO observes that the petitioner has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree, or the equivalent in a specific specialty. Therefore, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Here, the AAO incorporates by reference and reiterates its earlier discussions about the generalized nature of the petitioner's descriptions of the proposed duties. The petitioner has not identified any specialized or complex duty that requires a specific course of study in a specific discipline to perform the duties of the proffered position. Insufficient evidence was also provided to demonstrate that the proffered position reflects a higher degree of knowledge and skill than would normally be required of individuals in a general managerial occupation. The AAO, therefore, concludes that the proffered position failed to satisfy the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any one of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

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

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