



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
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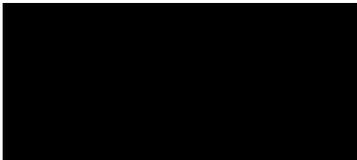
Date: 13 APR 2002

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)

IN BEHALF OF PETITIONER:



APR 13 2002

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant with ten projected employees and an estimated gross annual income of \$500,000. It seeks to employ the beneficiary as an executive chef for a period of three years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel submits a brief.

8 C.F.R. 214.2(h)(4)(ii) defines the term "specialty occupation" 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.

The director denied the petition because the duties described by the petitioner did not appear to be professional in nature. On appeal, counsel argues in part that the proffered position requires the services of an individual with a bachelor's degree in either hotel and restaurant management or culinary arts.

Counsel's statements on appeal are not persuasive. The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Plans menus taking into account probable number of guests, marketing conditions, and popularity of various dishes. Estimates consumption and purchases foodstuffs and kitchen supplies. Reviews menus, analyzes recipes, determines food, labor, and overhead costs, and assigns prices to menu items. Directs foodstuffs apportionment policy to control costs. Observes methods of foodstuff preparation and cooking, sizes of portions, and garnishing of dishes to ensure dishes are prepared in

prescribed manner. Tastes foodstuffs. Devises special menus and develops recipes. Hires and discharges employees. Familiarizes newly hired Chefs with practices of kitchen. Maintains time and payroll records. Establishes and enforces nutrition and sanitation standards. Oversees fashioning of tables and dishes decorations. Supervises and coordinates activities of chefs and other workers engaged in preparing and cooking foodstuffs. Gives instructions to chefs in fine points of cooking. Cooks and carves meats, and prepares dishes, such as sauces during rush periods and for banquets and other social functions.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

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.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

The Service does not agree with counsel's argument that the position of executive chef would normally require a bachelor's degree in culinary arts or a related field. A review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, finds no requirement of a baccalaureate degree in a specialized area for employment as a chef. Some chefs learn their trade through on-the-job training or through apprenticeship. Others hold certificates, associate degrees, and baccalaureate degrees from senior colleges and universities, junior and community colleges, or culinary institutes. Additionally, the Handbook does not state that a baccalaureate or higher degree in a specialized area is required

for employment as a food service manager. Executive chefs need extensive experience working as chefs. Some restaurant and food service managers are promoted from the ranks of restaurant workers. Others hold baccalaureate and associate (two-year) degrees in restaurant management and other fields of study.

Counsel further asserts that the DOL has determined that the proffered position is a specialty occupation. However, a reference in the Department of Labor's Dictionary of Occupational Titles (DOT), standing alone, is not enough to establish that an occupation is a specialty occupation. The DOT classification system and its categorization of an occupation as "professional and kindred" are not directly related to membership in a profession or specialty occupation as defined in immigration law. In the DOT listing of occupations, any given subject area within the professions contains nonprofessional work, as well as work within the professions.

The latest edition of the DOT does not give information about the educational and other requirements for the different occupations. This type of information is currently furnished by the Department of Labor in the various editions of the Handbook. The latter publication is given considerable weight (certainly much more than the DOT) in determining whether an occupation is within the professions. This is because it provides specific and detailed information regarding the educational and other requirements for occupations.

Counsel contends that the Handbook supports his arguments by indicating that, while several avenues of entering the profession are available, a bachelor's degree in hotel and restaurant or hospitality management, food service management or culinary arts provide a particularly strong preparation for a career in the field. Counsel cites an extensive list of educational institutions in the U.S. which offer a bachelor's degree in food service management or culinary arts to further support his position. However, the Handbook specifically notes:

"Most food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs...

For those not interested in pursuing a 4-year degree, more than 800 community and junior colleges, technical institutes, and other institutions offer programs in these fields leading to an associate degree or other formal certification.

Clearly, while a baccalaureate degree in restaurant and food service management is desirable for employment in the field, other types of training such as that received at community colleges and

technical institutes are also acceptable for entry into the field of restaurant management. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

The petitioner has not shown that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area such as culinary arts, for the offered position.

Counsel argues on appeal that a bachelor's degree in food service management or culinary arts is a standard requirement for the food service industry in parallel positions. In an attempt to provide evidence of an industry standard, the petitioner has submitted letters signed by three different executive managers employed at three separate hotels or inns. In nearly identical letters, these executive managers claim that their respective establishments require an individual to hold a bachelor's degree in hotel restaurant management for employment as an executive chef. These executive managers state that it is their opinion that the degree requirement is a common standard for employment as an executive chef in the hotel industry. However, the three letters are insufficient proof of an industry standard as none of the writers has provided any independent evidence which would tend to support their claims and opinions. The record does not contain any additional documentation which would tend to establish the existence of an industry standard requiring a bachelor's degree for employment as an executive chef. Accordingly, it cannot be concluded that the petitioner has demonstrated that the degree requirement is common to the industry in parallel positions among similar organizations.

In his denial, the director seemingly attached significance to the fact that the petitioner is a new restaurant with a small number of employees, as compared to a very large, established, or exclusive restaurant. However, the director's remarks regarding this issue are inappropriate and not relevant in determining whether the offered job of executive chef is a specialty occupation within the meaning of the statute or regulations.

Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

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.