



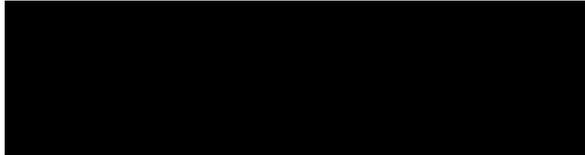
D2

U.S. Department of Justice

Immigration and Naturalization Service

Identification data deleted to prevent clearly unwarranted invasion of personal privacy

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: EAC-01-061-52250

Office: Vermont Service Center

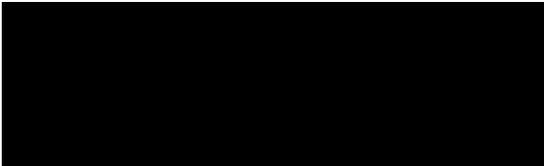
Date: 11 APR 2007

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:



Public Copy

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 company specializing in gourmet food preparation with 40 employees and a gross annual income in excess of \$5.8 million. It seeks to employ the beneficiary as a food service manager/chief 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 and documentation.

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 to be performed by the beneficiary did not appear to require a bachelor's degree. On appeal, counsel argues that the Department of Labor (DOL) has determined that food service managers, as well as other managerial and/or administrative positions are specialty occupations normally requiring a bachelor's degree or its equivalent.

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 a letter which accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

The position involves selecting and pricing menu items, estimating food compulsion, placing orders with suppliers, and scheduling the delivery of fresh food and beverages. The food service manager/chief chef is responsible for various administrative aspects of business.

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 proffered position of food service manager/chief chef would normally require a bachelor's degree or its equivalent. The proffered position appears to combine the duties of a food service manager with those of an executive chef. A review of the DOL's Occupational Outlook Handbook (Handbook), 2002-2003 edition, finds no requirement of a baccalaureate degree in a specialized area for employment as a restaurant or food service manager. 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.

A review of the Handbook also 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.

Counsel argues that the DOL has determined that the proffered position is a specialty occupation. Counsel asserts that the Handbook, as well as the "Occupational Employment, Training and Earnings Report" issued by the Bureau of Labor Statistics, both support her arguments. However, a reference in the "Occupational Employment, Training and Earnings Report," standing alone, is not

enough to establish that an occupation is a specialty occupation. While this report specifically notes that the typical education/training level is a bachelor's or higher degree for particular occupations (including managers and administrators), there is no indication that any of the listed occupations require a baccalaureate degree in a specialized area. Furthermore, the report does not provide any information on whether any of the listed occupations qualify as specialty occupations within the meaning of the regulations. This type of information is currently furnished by the Department of Labor in the various editions of the Handbook, as it is an authoritative survey of jobs and employment based upon figures from the Bureau of Labor Statistics. The latter publication is given considerable weight (certainly much more than the "Occupational Employment, Training and Earnings Report") 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 also contends that the Handbook supports her 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. 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.

The petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations,

number of employees, and amount of gross annual income, require the services of individuals in parallel positions.

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.