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U.S. Department of Justice
Immigration and Naturalization Service

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



File: WAC-02-136-52595 Office: California Service Center Date: DEC 13 2002

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)

PUBLIC COPY

IN BEHALF OF PETITIONER:
[Redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that 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 sustained.

The petitioner owns and operates several businesses in the food and beverage industry, including a French restaurant. It has 115 employees and a stated gross annual income of \$5.5 million. It seeks to employ the beneficiary as an executive pastry 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, a statement from the petitioner, and additional 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 determined that the petitioner failed to establish that the proffered position requires a bachelor's degree or its equivalent. On appeal, counsel argues that the proffered position is a specialty occupation because it requires a bachelor's degree in culinary arts with specialized experience in French pastry making. Counsel cites the holdings reached in a number of court decisions to support this argument. Counsel objects to the denial of this petition in light of the fact that a prior petition submitted by another party on the beneficiary's behalf for an identical position had been approved by the Service.

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 beneficiary in the offered position as follows:

...[The beneficiary] will supervise the restaurant's Pastry Department, which will be responsible for making unique pastry creations, homemade ice creams, chocolates and petit fours. In this connection, she will oversee the activities of three pastry chefs who engage in the preparation of the pastries and desserts that are served at Absinthe Brasserie and Arlequin Cafe for each meal as well as unique creations for special occasions. [The beneficiary] will plan the dessert menus and develop recipes; estimate food consumption; and purchase or requisition of ingredients and baking supplies. [The beneficiary] will analyze recipes to determine food, labor and overhead costs, and assign prices to dessert menu items. In addition, she will observe and direct methods of pastry preparation and baking techniques, determine sizes of portions and garnishing to ensure that all desserts according to French standards. In sum, the Executive Pastry Chef will have overall responsibility for all aspects of pastry preparation and presentation as well as the authority to hire, fire and train pastry cooks and assistants. She will maintain time and payroll records, allocate the budget for the Pastry Department, as well as establish and enforce nutrition and sanitation standards for the restaurant.

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.

In denying the petition, the director noted that the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, shows that the offered position of executive chef is

listed under the section for Food Service Managers at pages 55-57. The director determined that the Handbook finds no requirement of a baccalaureate degree in a specific specialty for employment in a food service manager position such as an executive chef. However, after comparing the job duties of the proffered position to the job duties of a food service manager position such as an executive chef as described in the Handbook, it is clear that the proffered position is more complex. Accordingly, the DOL's assessment of the training required to perform the duties of a food service manager position is not applicable in this particular case.

In its Handbook, at page 55, the DOL states, in part, the following about this position:

[M]anagers now are responsible for a growing number of administrative and human resource tasks. For example, managers must carefully find and evaluate new ways of recruiting employees in tight job market. Once hired, managers must also find creative ways to retain experience workers....

On a daily basis, managers estimate food consumption, place orders with suppliers, and schedule the delivery of fresh food and beverages. They receive and check the content of deliveries, evaluating the quality of meats, poultry, fish, fruits, vegetables, and baked goods. To ensure good service, managers meet with sales representatives from restaurant suppliers to place orders replenishing stocks of tableware, linens, paper, cleaning supplies, cooking utensils, and furniture and fixtures. They also arrange for equipment maintenance and repairs, and coordinate a variety of services such as waste removal and pest control....

The DOL's description of food service manager positions only minimally parallels the duties of the proffered position; estimating food consumption and the requisition of ingredients and baking supplies are the only duties of the offered job that are mentioned in the description above.

According to the petitioner, the beneficiary will allocate the budget for the Pastry Department, and have responsibility for all aspects of pastry preparation and presentation as well as the authority to hire, fire and train pastry cooks and assistants. These duties are more complex than the relatively simple duties of a food service manager position as listed in the Handbook. In addition, the petitioner never stated that the beneficiary would be responsible for such mundane duties such as checking the contents of deliveries, meeting with sales representatives, or arranging for

waste removal and pest control, in describing the duties of the offered position.

The Service notes that the Handbook provides valuable information on a wide range of occupations in the nation's economy. However, the Handbook's information is limited; it does not include all occupations, and only "provides a general composite description of jobs."¹ Thus, whether or not the Handbook states that a particular occupation normally requires a baccalaureate degree in a specific specialty for entry into the position, it is also necessary to consider the nature of the petitioner's operations and the job duties of the proffered position when determining whether a job is a specialty occupation.

Here, the petitioner is a fine dining establishment that has earned national renown for its food and service. The petitioner has described a position that, although akin to a food service manager, is far more complex than the DOL's description of such a position. Consequently, the petitioner's requirement of a bachelor's degree in hotel and restaurant management is a reasonable requirement.² Accordingly, the petitioner has satisfied the requirement in 8 C.F.R. 214.2(h)(4)(iii)(A)(2), and the director's objection to the approval of the petition has been overcome.

The record indicates that the beneficiary received a Certificat d'Aptitude au Professorat de Patisserie from the Ecole Hoteliere de Moulin a Vent in Perpigan, France in 1990. The beneficiary also received a Certificat d'Aptitude au Professorat de Chocolatier-Confiseur from the Ecole des Metiers de la Table in Paris France in 1991. In addition, the record reflects that the beneficiary has eight years of relevant employment experience at various restaurants and hotels in France. The beneficiary's education and work experience have been found to be the equivalent of bachelor of arts degree in hotel and restaurant management with concentration in culinary arts as awarded at an institution of higher learning in the United States. Therefore, the beneficiary is qualified to perform the duties of this specialty occupation.

¹ The DOL makes this statement in the Handbook's Acknowledgements page. The DOL further states that the Handbook cannot be expected to reflect work situations in specific establishments or localities.

² It is noted that the DOL states that "[m]ost food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs." Thus, the petitioner's requirement of a bachelor's degree in hotel and restaurant management for a non-trainee position is not excessive.

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 sustained that burden. Accordingly, the appeal will be sustained and the petition will be approved.

ORDER: The appeal is sustained. The director's order is withdrawn and the petition is approved.