D2

U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

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

File: EAC-99-152-52250 Office: Vermont Service Center Date: JUN 21 2002

IN RE: Petitioner: [redacted]
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)

PUBLIC COPY

IN BEHALF OF PETITIONER: SELF-REPRESENTED

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, Vermont Service Center. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner for Examinations on motion to reopen and reconsider. The motion will be granted. The previous decision of the Associate Commissioner will be affirmed.

The petitioner is a restaurant with approximately 15 employees and an approximate gross annual income of $1 million. It seeks to employ the beneficiary as a quality control manager for a period of five years. The director determined the petitioner had not established that the proffered position is a specialty occupation or that the beneficiary qualifies to perform services in a specialty occupation.

On appeal, the petitioner had provided a statement and the same evidence of the beneficiary's qualifications that was previously submitted.

The Associate Commissioner summarily dismissed the appeal reasoning that the petitioner had failed to identify any erroneous conclusion or statement of fact for the appeal.

On motion, the petitioner submits an income statement for the petitioner and states that section 245(i) of the Legal Immigration Family Equity Act (LIFE Act) is applicable.

The petitioner's argument on motion that the proffered position is a specialty occupation is not persuasive. 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 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:

> The Assistant Executive Chef is responsible for the entire kitchen operation of this one million dollar establishment. He reports only to the Executive Chef and the General Manager of the corporation. The Assistant Execut[ive] Chef's responsibilities will include hiring, training, and supervision of 15 persons. He will personally evaluate and establish salaries for these employees.
>
> The Assistant Executive Chef is required to have specialized knowledge in food preparation, preservation and presentation which is only available through the attainment of the service he most supervise [sic] incoming orders and completed orders, requiring the knowledge of exact timing for preparation of various items to be served simultaneously, delegating such tasks among the kitchen staff.
>
> His duties also include estimating daily inventory, food usage, storage and refrigeration of food stocks and the morning preparations for dinner service required for an efficient kitchen serving a large clientele. He will be involved in menu pricing, planning and testing new menu items, and training the staff on all changes and additions to food items. His duties will also include compliance with all local health codes and the general condition of the kitchen and its equipment.

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.

First, the Service does not agree with petitioner's argument that the proffered position is a specialty occupation that would normally require a bachelor's degree in a specialized field. The proffered position appears to be that of an executive chef. A review of the Department of Labor's Occupational Outlook Handbook, 2002-2003 edition, finds no requirement of a baccalaureate degree in a specialized area for employment as a chef. To achieve the level of skill required of an executive chef or cook in a fine restaurant, many years of training and experience are necessary. An increasing number of chefs and cooks obtain their training through high school, post-high school vocational programs, or 2 or 4-year colleges. They may also be trained in apprenticeship programs offered by professional culinary institutes, industry associations, and trade unions. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, 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 for the offered position. Third, 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.

As the petitioner has not sufficiently established that the proffered position is a specialty occupation, the beneficiary's qualifications need not be examined further in this proceeding.

The petitioner's argument that section 245(i) of the LIFE Act is applicable to this proceeding is noted. Such regulations, however, relate to adjustment of status issues and not to the specialty occupations provided for in Section 101(a)(15)(H)(i)(b) of the Act.

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. Accordingly, the decision of the director will not be disturbed.

ORDER: The decision of the Associate Commissioner dated September 7, 2001, is affirmed.