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U.S. Department of Homeland Security
Bureau of Citizenship and Immigration Services

**Identifying data deleted to
prevent clearly unwarranted**

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 MASS, 3/F
Washington, DC 20536



File: EAC 01 227 53929 Office: VERMONT SERVICE CENTER Date: **AUG 20 2003**

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:

PUBLIC COPY

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 Bureau of Citizenship and Immigration Services (Bureau) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a Connecticut wholesale baker specializing in French croissants, puff pastry and Danish pastries. It has 30 employees and a gross annual income of \$3,000,000. It seeks to temporarily employ the beneficiary as a product manager for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation or that the petitioner, based on its size and years in business, required a professional production manager.

On appeal, counsel asserts that the position of product manager is a specialty occupation, and states further that the Bureau apparently held the petitioner to higher standards than the regulations required.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184 (i)(1), defines the term "specialty occupation" as an occupation 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 theoretical and practical application of a body of highly specialized knowledge in field 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.

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 issue in this proceeding is whether the petitioner has established that the proffered position is a specialty occupation. In the original petition received by the Vermont Service Center on July 18, 2001, the petitioner described the duties of the proffered position as follows:

As Product Manager, [the beneficiary] will be primarily responsible for the development, management and coordination in the United States of the Lecoq USA product line which is distributed in the United States and abroad, including the quality control thereof. Some of the specific duties to be undertaken by [the beneficiary] will include:

Coordination of production of frozen items;

Supervision, management and coordination of a team of 22 employees;

Training and hiring of personnel; and

Formulation and implementation of innovations into production process and expansion plans;

██████████ challenged as is [sic] all other similarly situated companies, with an allocation of resources against a highly complex and competitive marketplace. As Product Manager, [the beneficiary] will assist in providing the leadership and strategic direction necessary to protect ██████████ position in the marketplace.

The petitioner also provided the following explanation of its business:

██████████, [sic] founded in 1991 by French born and trained ██████████ uses only the freshest ingredients, and offer[s] the finest all butter Croissants, Danishes and Puff Pastry. Our artisan-crafted product line is distributed throughout the US

and Caribbean and is available frozen in two forms - "proof and bake" and ready to bake". [sic] The reason for our success is simple, we use top quality ingredients and traditional French techniques. [REDACTED]

[REDACTED] has invested in state of the art equipment in order to preserve quality while satisfying institutional market demand. With over nine years in business we have proven our consistency, reliability and services to be among the best in the industry. Our company provides pastries for some of the US's [sic] most exclusive properties including the Hyatt Regency, The Ritz Carlton and the Waldorf Astoria and Plaza in New York City.

On October 4, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested a detailed statement on the beneficiary's proposed duties and responsibilities and the percentage of time that the beneficiary would spend performing the specific duties each day. The director also requested that the petitioner identify which specific tasks required the expertise of an individual who held a baccalaureate degree. With regard to establishing an industry standard, the director requested documentary evidence that showed that within the wholesale baking industry, a baccalaureate degree in a specific field of study was a standard minimum requirement for the proffered position. In addition, the director requested that, when presenting evidence with regard to the industry standard, the petitioner refer to companies of comparable size, distinction, and function. Finally the director requested more information with regard to the number of individuals in the petitioner's business either currently employed in the proffered position, or who have been employed in the position in the past two years, and their academic credentials.

In response, the petitioner submitted information from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* on industrial production managers. The petitioner stated that, based on this information, the proffered position required either a baccalaureate degree or prior experience in the field. In addition, the petitioner submitted excerpts from three websites. Two websites were for two large wholesale food producers in the United States and the third website, according to the petitioner, listed job openings throughout the United States in the food industry in small and medium-sized companies. With regard to prior hiring practices, the petitioner stated that no other individuals were or had been employed in a position similar to the proffered position.

With regard to a more specific description of the beneficiary's job responsibilities, the petitioner provided the following information:

As an example of his activities, [the beneficiary] will be responsible for the production activities of our frozen items, including the optimization of the

manufacturing process and customers' satisfaction and the implementation of innovations in terms of production methods as part of the company's expansion strategy. Additionally, [the beneficiary] will report directly to the President and interact with other plant personnel as well as schedule overtime or extra shifts based on the machines [sic] capacities and specialization, recruit, train and coordinate personnel's activities during the manufacturing process. In this position, [the beneficiary] manages and supervises six production supervisors and a workforce of 28 employees.

With regard to a percentage breakdown of job duties, the petitioner provided the following breakdown of job duties and time spent in each area:

Monitoring standards of frozen items including improvement of such standards 30 percent

Implementation of training programs 20 percent

Planning of production schedule, including overtime and extra shifts 20 percent

Meeting with management to implement innovations and new production processes 30 percent

On April 15, 2002, the director denied the petition. The director stated that the *Handbook* excerpt referred to by the petitioner actually established that the proffered position did not require a baccalaureate degree. In addition the director determined that much larger, more prominent firms most commonly employ professional production managers, and that, since the petitioner was a small, relatively new company, it did not appear to require the services of a professional production manager. The director noted that the job announcements submitted for the record by the petitioner were either for food wholesale companies much larger and more prominent than the petitioner or were for jobs that indicated a baccalaureate degree was only "preferred" or "desired."

In addition, in examining the second criterion of 8 C.F.R. § 214.2 (h)(4)(iii)(A), the director stated that the petitioner had not established that "the beneficiary's duties were so unique that only a beneficiary who possessed abilities and education beyond the industry standard could perform them."

On appeal, counsel states that its interpretation of the *Handbook* excerpt is that it is common for many industrial production managers to hold at least a bachelor's degree in the specialized areas of business administration or industrial engineering. In addition counsel asserts that the Bureau incorrectly raised the issue of the size and previous hiring practices in its dismissal of the instant petition and cites *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal 1989). Counsel also takes exception to the

Bureau's analysis that the beneficiary needs to establish that he possesses abilities and education beyond the industry standard to establish the second prong of 8 C.F.R. § 214.2 (h)(4)(iii)(A). With regard to the specialized nature of the duties of the proffered position requiring a baccalaureate degree, counsel states the following:

The company is investing over one and a half million dollar [sic] in new high performance equipment (identical to the equipment owned by Kraft company) and is in the process of moving to a new location which will accommodate such equipment (as it is over twice the size of its current location and has enough land to grow another four fold.) This new equipment will allow the company to transform its production from a "semi-automated" one to a fully "automated" one, translating in turn into an increased production (from 40,000 to 60,000 items a day which will end this year at around 100,000 a day with the current implementation of a second shift to 15,000 to 20,000 items an hour as currently).

Counsel then provides three additional reasons for hiring a professional as its production manager. First, the company is growing and is rapidly expanding to a full industrial production scale. Second, the handling of the complex equipment, including the training and troubleshooting, would require a more knowledgeable manager. Finally, the beneficiary's duties will not be routine, in that the beneficiary will also have to monitor the performance of the new equipment.

Upon review of the record, it appears that the director's remarks with regard to the petitioner's size and relative newness are immaterial to this proceeding. See *Young China Daily v. Chappell*, 742 F. Supp. 552 (N.D. Cal 1989). In addition, the record establishes and the petitioner's website at lecoqcuisine.com corroborates that the petitioner has been in business for at least a decade. As such, the petitioner is not a relatively new business.

The Immigration and Naturalization Service, now the Bureau of Citizenship and Immigration Services (Bureau) often looks to the Department of Labor's (DOL) *Occupational Outlook Handbook* (*Handbook*) when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position.

The basic duties of an industrial production manager as outlined in the 2002-2003 edition of the *Handbook* on page 64 are as follows:

Industrial production managers coordinate the resources and activities required to produce millions of goods every year in the United States. Although the duties vary from plant to plant, industrial production managers

share many of the same major responsibilities. These responsibilities include production scheduling, staffing, procurement and maintenance of equipment, quality control, inventory control, and the coordination of production activities with those of other departments.

The *Handbook* states the following about the training and educational requirements for industrial production manager positions:

Because of the diversity of manufacturing operations and job requirements, there is no standard preparation for this occupation. However, a college degree is required, even for those who have worked their way up the ranks. Many industrial production managers have a college degree in business administration, management, industrial technology, or industrial engineering. Others have a master's degree in industrial management or business administration (MBA). Some are former production-line supervisors who have been promoted. Although many employers prefer candidates with a business or engineering background, some companies hire well-rounded liberal arts graduates.

To the extent that the *Handbook* indicates that employers of production managers now require a bachelor's degree for entry into the proffered position, it appears that the educational requirements for the classification of production manager have evolved. However, the fact that employers now require a bachelor's degree for entry into the profession does not meet the requirements for the instant petition as required by the Act.¹

As stated previously, the statute establishes that the petitioner must show that the proffered position requires a baccalaureate degree or higher, or the equivalent, in a specific specialty. (Emphasis added.) To interpret the criteria in 8 C.F.R. 214.2(h)(4)(iii)(A) as solely requiring a bachelor's degree is an incorrect interpretation.

Although the *Handbook* does indicate that most applicants for production manager positions are required to have related degrees such as business administration, industrial technology, or industrial engineering, it also indicates that some employers would hire liberal arts graduates. Accordingly, the *Handbook* does not support a finding that a baccalaureate degree or a higher

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *Defensor v. Meissner* 201 F.3d 388 (5th Cir. 2000).

degree in a specific specialty or their equivalent is normally the minimum requirement for entry into the proffered position.

Nevertheless, upon review of the record, the nature of the specific duties of the proffered position does appear specialized and complex enough that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The distinctive products baked by the petitioner, the multiple layers of the job involving the supervision of two levels of personnel, the extensive managerial liaison with the petitioner's owner, the ongoing quality assurance of current bakery products and the expansion and creation of new bakery lines all contribute to making the proffered position a complex one. The fact that the petitioner would require an individual with a bachelor's degree in agricultural engineering to perform the duties of the position does not appear excessive. Accordingly, the petitioner has established the fourth prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Accordingly the petitioner has established that the proffered position is a specialty occupation.

With regard to the issue of whether the beneficiary is qualified to perform the duties of the proffered position, the record contains sufficient documentation with regard to the beneficiary's degree in agricultural engineering and its equivalency to a similar degree obtained through an accredited U.S. institution of higher education. This degree appears to be closely related to the specific specialty of industrial engineering outlined in the *Handbook's* description of production manager.

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.