

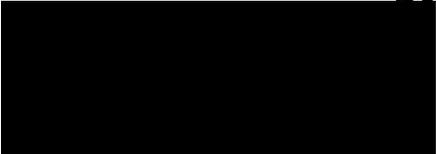
U.S. Department of Homeland Security

Citizenship and Immigration Services

DD

PUBLIC COPY

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

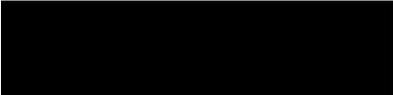


FILE: SRC 03 064 50072

OFFICE: TEXAS SERVICE CENTER

DATE:

IN RE: Petitioner:
Beneficiary:



DEC 03 2003

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:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

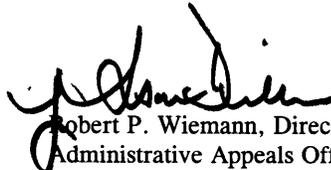
INSTRUCTIONS:

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 Citizenship and Immigration Services (CIS) 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, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an oriental restaurant that currently employs five persons and has a gross annual income of \$265,000. It seeks to employ the beneficiary as a specialty chef for a period of three years. The director denied the petition because the proffered position was not a specialty occupation.

On appeal, counsel submits a brief and additional evidence.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an one 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 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.

On the Form I-129, the petitioner listed the proffered position as "Specialty Chef," and described the proposed duties in these terms: "Plans menus and cooks oriental style dishes. Selects and develops recipes based on types of foods. Estimates food consumption and requisition of food supplies."

Submissions with the Form I-129 included a letter from the petitioner's president, dated December 23, 2002, described the specialty chef duties as follows:

[The beneficiary] will plan menus and cook Oriental-style (mainly Korean-style and Chinese-style) dishes, dinners, desserts and other foods. In doing so, [the beneficiary] will select and develop recipes based on [the] type of food to be prepared and applying personal knowledge and experience in food preparation. [The beneficiary] will also estimate food consumption, and requisitions [sic] or purchase food supply and will receive and examine foodstuffs and supplies to ensure quality and quantity meet established standards and specifications.

On review of the Form I-129 and associated documents, the director issued a request for additional evidence, stating, in part:

The position being offered is "specialty chef." The position of specialty chef does not require the minimum of a bachelor's degree. Industry standards do not require bachelor's degrees for this position. Submit convincing evidence that the position of specialty chef requires the minimum of a bachelor's degree or its equivalent.

In response to the request for additional evidence, the petitioner's president filed a letter, dated January 17, 2003. This letter described the proffered duties in essentially the same terms as the previous letter, but added that the beneficiary "is also responsible for directing of kitchen workers engaged in preparing and cooking various meats, sauces, vegetables, soups and other ingredients."

The president stated that the proffered position "is regarded as a special occupation in our industry" and, "[t]o support this industry standard," enclosed excerpts from these three Department of Labor (DOL) publications: the Internet version of the *Occupational Outlook Handbook*, 2002-2003 edition (*Handbook*); the 2003 Internet *Occupational Information Network*, *O*NET Online* (*O*Net*); and the *Dictionary of Occupational Titles* (*DOT*). The specific occupational titles addressed by the excerpts were: (1) "Chefs, Cooks, and Food Preparation Workers," in the *Handbook*; (2) "313.361-030 Chefs and Head Cooks," in *O*Net*; and (3) "313.361-030 Cook, Specialty, Foreign Food (hotel & rest.)," in the *DOT*.

According to the president, the enclosed documents indicated that "most employers require [a] four-year bachelor's degree or equivalent experiences, including vocational training." The president pointed to the *Handbook* excerpt as mentioning that "most fine dining restaurants require 8-15 years of cook experience for their head chef/master chef position." He also stated that the *O*NET* and *DOT* "demonstrate that [the] SVP

(Specific Vocational Preparation) Range for chef lies in between 7.0 and 8.0. Finally, the president maintained that all of the enclosed documents "show that the position of head chef is regarded as a specialty occupation."

The director denied the petition because she found "that the occupation being offered does not qualify as an occupation requiring the minimum of a bachelor's degree." The denial stated, in part, that, despite the petitioner's efforts to show otherwise, the petitioner was not proffering an executive chef position. The denial also determined that an executive chef position was not a specialty occupation because that position does not require the minimum of a bachelor's degree or its equivalent.

On appeal, counsel states, in part, that the proffered position "also include[s] managerial duties such as supervising [the] kitchen and dining room." Counsel further describes the managerial acts:

More specifically, [the beneficiary] will oversee all food preparation and cooking, examine the quality of foods to ensure that dishes are prepared and garnished correctly and in a timely manner. [The beneficiary] will also investigate and resolve customers' complaints about food quality or service. Other important duties include monitoring [the] budget, keeping records of the hours of employees and payroll records, and estimating food and beverage consumption to anticipate [the] amount to be purchased.

Counsel maintains that the petitioner is proffering a position for an "Executive Chef" who will act as a general manager, and, towards the end of his brief, refers to the position as "an executive chef/general manager who can direct and manage all kitchen employees, including cook/chef, as well as can cook authentic oriental dishes." Counsel notes that "carelessness" in the petitioner's "classification" of the job position may lead reviewing officers "to think and conclude that the position of 'Executive Chef' is only the decorative name of a regular cook."

Counsel encloses the Internet *Handbook's* section on food service managers, and the O*Net summary report for food service managers. Counsel asserts that these documents "explain the position of "Executive Chef" as similar [to] or [the] same position as "Food Service Manager" or "General Manager" of the restaurant. Counsel next asserts that the proffered position is a specialty occupation because the enclosures indicate that: (1) "most restaurants and hotels require [a] bachelor's degree for the position of executive chef/food service manager/general manager," and (2) "executive chefs also usually hold the position of general managers in many small and medium size restaurants."

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.

Upon full review of the entire record, the AAO has determined that the petitioner has not established that the proffered position is a specialty occupation. As the following discussion will show, the evidence does not satisfy any of the qualifying criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

It is worth emphasizing that "degree" as used in each of the four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) means one in a "specific specialty," that is in a discipline associated with a body of highly specialized knowledge. See section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1).

**I. Baccalaureate or higher degree or its equivalent as the normal minimum requirement for entry into the particular position.
-8 C.F.R. § 214.2 (h) (4) (iii) (A) (1).**

As discussed below, the evidence does not establish that the proffered position is one that normally requires a bachelor's degree in a specific specialty, or its equivalent, as a minimum for entry-level hire.

The AAO regularly consults the *Handbook* for information about the duties and educational requirements of certain occupations. Here, the AAO focused on the *Handbook* sections to which counsel and the petitioner's president referred, that is: "Chefs, Cooks, and Food Preparation Worker," at pages 306 to 309; and "Food Service Managers," at pages 55-59. The AAO concurs with counsel that the proffered position's duties definitely exceed those of a

specialty cook. The AAO also finds that the duties as described in the record substantially equate to the *Handbook* "food manager" occupation.

However, the *Handbook* further indicates that food manager positions do not normally require a bachelor's degree, or its equivalent, in any specific specialty. This excerpt from page 57 of the *Handbook* is persuasive on this point:

Most food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs. Food service and restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated interest and aptitude. Some restaurant and food service manager positions, particularly self-service and fast food, are filled by promoting experienced food and beverage preparation and service workers. Waiters, waitresses, chefs, and fast-food workers demonstrating potential for handling increased responsibility sometimes advance to assistant manager or management trainee jobs. Executive chefs need extensive experience working as chefs, and general managers need experience as assistant managers.

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in The Department of Labor's *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991). However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

The AAO discounted the *O*Net* and *DOT* comments about educational requirements. The DOL has replaced the *DOT* with *O*Net*. Both sources provide only general information on occupations' requirements in the area of education, training and experience. Accordingly, the AAO does not consider *O*Net* and *DOT* information in this area, but, instead, relies on DOL's *Handbook*. This source provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within it. Accordingly, the AAO is not persuaded by the petitioner's documentation of the *DOT's* assigning a "7.0 to <8.0" SVP (Special Vocational Preparation) rating to chefs. Likewise, the AAO is not persuaded by the evidence that *O*Net* has assigned a "7.0 to <8.0" SVP to "chefs and head cooks" and "food service managers," and states that "Most of these occupations require a four-year bachelor's degree, but some do not."

As the evidence does not establish the proffered position as one that normally requires a bachelor's degree or higher in a specific specialty, the petitioner has not met the specialty occupation criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

II. Degree requirement that is common to the industry in parallel positions among similar organizations, or, alternatively, a particular position so complex or unique that it can be performed only by an individual with a degree.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (2).

A. Degree requirement common to the industry.

Factors often considered by Citizenship and Immigration Services (CIS) when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

As discussed in the preceding section of this decision, the *Handbook* indicates that, for food service managers, there is no industry-wide, standard requirement of a bachelor's degree in a specific specialty. Furthermore, the petitioner has presented no documentation that counters the *Handbook's* information.

B. Degree necessitated by the complexity or uniqueness of the position.

The record fails to establish that the particular duties of the proffered position are either so complex or so unique that only an individual with a bachelor's degree in a specific specialty could perform them.

The duties, as enumerated and described in the record, appear neither especially complex nor unique. The record conveys a position which requires multiple, routine tasks, such as deciding menus, supervising several subordinates in their cooking duties, projecting food purchase requirements, arranging for the accurate and timely delivery of food and supplies, and keeping basic records on employee hours and pay. The position indicates no aspects that would elevate it above usual expectations for a food service manager.

For the reasons discussed above, the position does not qualify as a specialty occupation under either criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

III. Degree or its equivalent as the employer's normal requirement for the position.

-8 C.F.R. § 214.2 (h) (4) (iii) (A) (3).

As the petitioner presented no evidence on this issue, there cannot be a finding for the petitioner on 8 C.F.R. § 214.2(h) (4) (iii) (A) (3).

IV. Specific duties of a nature so specialized and complex as to require knowledge usually associated with a baccalaureate or higher degree.-8 C.F.R. § 14.2 (h) (4) (iii) (A) (4).

To the extent that they are depicted, the duties appear to involve a mixture of limited managerial and supervisory duties in a restaurant workplace. The evidence does not establish that these duties or any other aspects of the position are, alone or in combination, so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree in any specific specialty. For the reasons stated above, the director's decision shall not be disturbed.

Beyond the decision of the director, it should be noted that, even if the position had qualified as a specialty occupation, the evidence would not support granting the beneficiary H-1B status. This is because the evidence fails to establish that the beneficiary is qualified for a specialty occupation position in accordance with 8 C.F.R. § 214.2(h) (4) (iii) (C). As the appeal is being dismissed on another ground, however, this issue will not be discussed further.

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. The petition is denied.