

PUBLIC COPY

D 2

U.S. Department of Homeland Security

Citizenship and Immigration Services

identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

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



FILE: WAC 01 299 50459

OFFICE: CALIFORNIA SERVICE CENTER

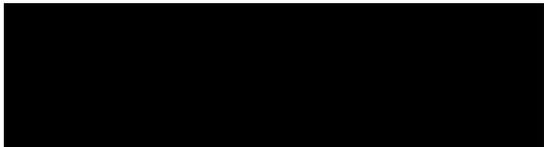
DEC 17 2003
DATE:

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:



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, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant that currently employs 80 persons and has a gross annual income of \$4,000,000. It seeks to employ the beneficiary as an executive chef for a period of three years. The director denied the petition for failing to establish that the proffered position qualified as a specialty occupation.

On appeal, counsel submits a letter 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 "Executive Chef" and described the proposed duties as follows:

Manage, Direct, and supervise all of the restaurant's food activities. Tasteful and skillful preparation of traditional French dishes and delicacies, creation of new entries and other special dishes; deciding on the size of servings, arraning [sic] how meals are presented, and planning of meals, the development and

changing of the menus; estimation of food requirements, food cost control, selection and storage of foods.

Among other documents submitted with the Form I-129 was a letter of support from the petitioner's general manager. The following excerpt is instructive on the duties proposed for the beneficiary and on the work environment where he would perform them:

[The petitioner] is an elegant restaurant located on the Las Vegas strip at the Barbary Coast Hotel and Casino. We are open every day of the week. There are 83 employees, 15 of which are in the kitchen. Up to 350 persons may be served at one time. On an average[,] we serve 200 persons each day . . .

Our reputation for serving only the finest and most innovative food is essential to our success. The menu is basically French , with European and cosmopolitan cuisine. The executive chef, however, is the one person who is responsible for the menus, planning for new and innovative items, however also and of most critical importance, the quality and excellence of the foods that are served.

The services

The duties to be performed by [the beneficiary] are to manager [sic], direct and supervise all of the restaurant[']s food activities. This involves complex and unique services which can only be performed by someone with the necessary education, experience, discipline, management capabilities and the skill, which is required. The success of the chef's work, and thus the success of our restaurant[,] is determined by the quality and excellence of the foods prepared and how they are presented to our customers.

The general manager's letter repeats the Form I-129's description of duties and adds, "ordering of food supplies and minimization of waste, anticipating the amount of perishable supplies needed."

The letter also comments, in part, that an "essential part of the executive chef's work will be to organize, supervise and direct sous chef(s), cooks, kitchen personnel and those who serve the food." According to the letter, the executive chef will also have the authority to hire and fire.

The director issued a request for additional evidence about job duties and the need for a person with a bachelor's degree or the equivalent in an occupational field. The request also sought specific types of evidence relevant to the regulatory criteria for an H1-B specialty-occupation.

In his denial, the director stated that the evidence of record did not establish that the proffered position qualified as an H-1B specialty occupation under any of the regulatory criteria.

In a letter of response, the petitioner's general manager explained how critical the executive chef position is to the petitioner's success, and he maintained that the position involves "a series of complex and unique services." This letter divided the executive chef's duties into the percentages of time that they required. Here the general manager also asserted that the position required a bachelor's degree in culinary arts, or its equivalent, and that the executive chef duties "necessitates theoretical and practical application of a body of highly specialized knowledge."

In a section entitled "Position requirements," the general manager presented the petitioner's perspectives on why the proffered position should be recognized as a specialty occupation.

The director denied the petition on finding that the petitioner failed to produce adequate evidence that the proffered position satisfied any one of the four criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

On appeal, counsel submits a brief and a two-page "questionnaire" from the general manager, the content of which counsel expressly incorporates in the brief.

The general manager expands on the earlier duty descriptions, by answering six questions dealing with the foods the beneficiary would prepare, the executive chef's supervisory duties, the kinds of food the executive chef orders, how the proffered position differs from a McDonald's cook, and where competitors get their chefs.

In the brief, counsel advocates why the proffered position satisfies the criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

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.

As the following discussion will show, the AAO has determined that the record has not established that the proffered position is a specialty occupation under any of the qualifying criteria of 8 C.F.R. § 241.2(h)(4)(iii)(A).

The AAO has observed that counsel and the petitioner have presented articulate statements to advocate the proffered position as a specialty occupation. However, mere assertions by petitioners and their counsel have no inherent evidentiary weight:

1. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).
2. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The discussion will not repeat these evidentiary principles, but the AAO applied them in its evaluation of the record on each of the criteria discussed below.

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).

When determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a proffered position, the AAO looks to Department of Labor's *Occupational Outlook Handbook (Handbook)* for comments on the occupations it addresses. Here the AAO consulted the 2002-2003 edition.

The evidence indicates that the duties of the proffered position substantially comport with the chef occupation as addressed in the *Handbook's* section on "Chefs, Cooks, and Food Preparation Workers,"

at pages 306 to 309. Of particular note is this segment on executive chefs, from page 306:

[E]xecutive chefs and head cooks coordinate the work of the kitchen staff and often direct the preparation of certain foods. They decide the size of servings, plan menus, and buy food supplies. Although the terms chef and cook still are used interchangeably, chefs tend to be more highly skilled and better trained than most cooks. Due to their skillful preparation of traditional dishes and refreshing twists in creating new ones, many chefs have earned fame for both themselves and for the establishments where they work.

The following excerpt, from pages 307 and 308 of the *Handbook*, indicate that the proffered position - whose duties substantially match that of the *Handbook's* executive chef - does not normally require a bachelor's degree, or its equivalent:

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. Chefs and cooks also may be trained in apprenticeship programs offered by professional culinary institutes, industry associations, and trade unions. An example is the 3-year apprenticeship program administered by local chapters of the American Culinary Federation in cooperation with local employers and junior colleges or vocational education institutions. In addition, some large hotels and restaurants operate their own training programs for cooks and chefs.

Furthermore, the record lacks probative evidence that the proffered position normally requires a bachelor's degree, or its equivalent, in a specific specialty.

For the above reasons, 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)).

The above discussion about the *Handbook* applies equally here and need not be repeated. Simply put, the *Handbook* indicates that there is not an industry-wide degree requirement for executive chefs. Furthermore, aside from assertions of counsel not corroborated by any documentary evidence, the record is silent on this criterion.

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 descriptions of the proffered position's duties are not persuasive, for they appear no more demanding or challenging than what would normally be expected from an executive chef as described in the *Handbook*. In addition, the record contains no documentary evidence to rebut this perception, and mere assertions by counsel or the petitioner are without merit.

The director was correct in not granting the petition under 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 provided no evidence relevant to this criterion, there is no basis for finding a specialty occupation by application of 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).

The record does not depict duties that, alone or in combination, are so specialized and complex as to require the highly specialized knowledge usually associated with a bachelor's degree in any specific specialty.

Therefore, the evidence does not establish that the proffered position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

As related in the discussions above, the petitioner has failed to establish any one of the four specialty occupation criteria of 8 C.F.R. § 214.2 (h)(4)(iii)(A). Accordingly, the AAO shall not disturb the director's denial of the petition.

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.