

PUBLIC COPY

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

U.S. Department of Homeland Security

Citizenship and Immigration Services

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

DO



File: WAC 01 245 56592 Office: CALIFORNIA SERVICE CENTER

Date: **NOV 05 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:



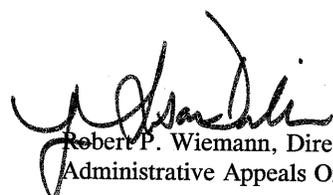
INSTRUCTIONS:

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 the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The petitioner is a California restaurant specializing in French cuisine. It has 12 employees and a projected gross annual income of \$350,000. It seeks to temporarily employ the beneficiary as a restaurant manager for a period of three years. The director determined that the petitioner had not established that the proffered position was a specialty occupation.

On appeal, the petitioner reiterates its explanation of the specialized nature of the proffered position, and submits a new job vacancy announcement for a similar position.

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 California Service Center on July 27, 2001, the petitioner described the duties of the proffered position as follows: "Supervision of restaurant operations."

The petitioner also provided the following expanded description of the position:

As [r]estaurant [m]anager, [the beneficiary] will utilize his special training and extensive knowledge of the restaurant business to perform numerous managerial functions. [The beneficiary] will work closely with the executive chef and the owner to improve the restaurant's profit[a]bility. As [r]estaurant [m]anager, [the beneficiary] will be responsible for hiring a professional staff whom [sic] are capable of maintaining the high standards that [the beneficiary] will be expected to set for them. [The beneficiary] will hire and train new employees, as well as train exist[ing] employees. For example, training and oversight duties will include an explanation of house policies, culinary, and proper tableside techniques and etiquette.

[The beneficiary] will be expected to develop a professional environment in the restaurant. Knowledge, respect, and professionalism will increase sales and profitability, and assist in retaining valued employees.

To maintain the level of quality and professionalism, [the beneficiary] will organize periodic meetings with restaurant personnel. He will perform important functions such as wine tasting, technique and menu explanations, and instruct in proper food handling and service procedure[s]. [The beneficiary] will also supervise employee[s'] actions to ensure that health and security regulations are adhered to.

As the [r]estaurant [m]anager, [the beneficiary] will work closely with sales managers, representatives, and purveyors in ordering food and beverages for the restaurant, in accordance with business volume. In doing so, [the beneficiary] will be expected to maintain

the highest quality while also seeking to lessen food, beverage, and labor costs.

[The beneficiary] will be responsible for the creation of new menus and wine pairing, for creating a wine list that is suitable for a French bistro, for the scheduling of employee working hours and cleaning duties, and for seating charts, dining rooms maps, and inventory lists. [The beneficiary] will organize the storage rooms, the wine cellar, and the rest of the supplies that are required to operate the restaurant, such as linen, tableware, furnishings, food and other beverages.

In his capacity as [r]estaurant [m]anager, [the beneficiary] will perform inventories on stock and conduct meetings related to service improvement. After conducting a cost analysis, he will make the changes that are necessary to establish the cost set. For instance, this will include removal of unpopular menu items, improvements to existing menu items, and additional quality controls.

As [r]estaurant [m]anager, [the beneficiary] will organize special events and develop our catering department to reach a larger range of potential customers to increase profitability. [The beneficiary] will be responsible for the advertising scheme and the organization of theme-dinners, such as wine dinners with the participation of premier wineries, French regional discovery dinners, and acoustic music dinners. [The beneficiary] will also oversee the catering division and the creation of dinners for individual customers.

As [r]estaurant [m]anager, [the beneficiary] will need to understand and respond to the unique requirements of the restaurant business industry in terms of being able to sufficiently cover peak dining periods, resolve customer complaints, open and close the restaurant and its accounts, write an after-shift report, and perform other such duties.

The director asked for further information with regard to whether the proffered position was a specialty occupation. In particular, the director requested more evidence with regard to how the petitioner could establish any of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). The director also requested a certified Labor Condition Application (LCA).

In response, the petitioner submitted a certified LCA. It also submitted recent restaurant reviews of its restaurant by various media in the San Diego County area. One article submitted described the four awards received by the petitioner's restaurant, eight months after it opened, in the 18th Annual Best Awards presented by *Entertainer & Lifestyles* magazine. According to the article, the

petitioner's restaurant received top honors in best new restaurant, best continental restaurant, best French restaurant and best service in the coastal area of San Diego County. The petitioner also submitted an evaluation written by Dr. Marietta M. Advincula, dean of the hospitality program, Milwaukee Area Technical College. Dr. Advincula evaluated the proffered position in terms of the level of education required to perform the duties associated with the position.

In its letter in response to the director's request for further evidence, the petitioner also stated: "The complex varied duties of the restaurant manager at Le Passage combined with our particular niche and our high standards make Le Passage management significantly more complicated than regular restaurant management." The petitioner stated that the clientele that frequented the restaurant could be considered connoisseurs, and that some of them belong to dining clubs and travel to France in search of the "perfect" meal. According to the petitioner, the expectations of such a clientele are higher than other restaurant goes for authenticity and high quality. In addition, the petitioner stated that customers utilizing the petitioner's catering service would also expect excellent food and service. According to the petitioner, such a catering operation involves numerous complex tasks.

Among other specialized areas of food service, the petitioner mentioned items such as the creation of a vegetarian menu that is true to French cuisine, the preparation of regional French menus, and the creation of special menu formulas for special events in clients' homes or elsewhere. In addition, the petitioner stated that its restaurant offers a wine list from around the world and that its restaurant manager had to possess an extensive knowledge of wines. According to the petitioner, this knowledge would be utilized in wine-tasting and wine classes that would be organized by the beneficiary.

On February 20, 2002, the director denied the petition. The director noted that the proffered position was analogous to the food service manager classification in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* and noted that this classification does not normally require a bachelor's degree or higher in a specialized area of study for entry into the position. The director also determined that the petitioner had not established any other criteria of 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, the petitioner notes that the director's decision was addressed to Passage India Group, Inc, which is a restaurant chain in southern California specializing in Indian food. The petitioner states that the objective of its restaurant is to provide the best French cuisine and to recreate French ambiance in the most authentic way possible. The petitioner also submits a job vacancy announcement from a French language web site entitled "lhoteellerie.com." The job vacancy is for a French-American thematic restaurant franchise and requires persons with a

baccalaureate degree and with five years of experience to manage restaurants in California.

Upon review of the record, the director correctly classified the proffered position as a food service manager; however, the nature of the petitioner's restaurant appears substantially different from the types of restaurants outlined in the *Handbook* classification. The petitioner is not a food service management company or a national or a regional restaurant chain. It is a single restaurant that specializes in French or French fusion cuisine. The *Handbook* does not address the necessary qualifications for the position of restaurant manager within such a business enterprise.

With regard to the second criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A), the petitioner provided one job vacancy announcement for a French-theme franchise which also is not analogous to the nature of the petitioner's business. In addition one job vacancy announcement would not establish a nation wide standard for requisite academic credentials to enter into the positions similar to the proffered position. With regard to the third criterion, the petitioner provided no information with regard to any previous restaurant manager hires at its restaurant. Therefore the petitioner did not establish either of these two criteria.

Nevertheless in reviewing the nature of the petitioner's business and the prospective duties of the beneficiary, the petitioner has presented a persuasive argument for classifying the position as a specialty occupation, based on 8.C.F.R. § 214.2(h)(4)(iii)(A)(4), namely, 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's restaurant is an upscale dining experience with particular emphasis on French cuisine. As previously stated, it is not part of a regional or national chain with a large management infrastructure and established operational plan, but rather a single upscale restaurant. Given the multiple layers of duties with regard to the provision of fine French or French fusion cuisine and wines within an upscale restaurant environment, the hiring, training and oversight of wait staff, the planning and responsibilities for special events and meals featuring French food, budgeting responsibilities and the logistical oversight inherent to the manager's job, it does not appear excessive that the petitioner requires a bachelor of science degree in restaurant management.

The critical element in the analysis of this criterion is not the employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for

entry into the occupation as required by the Act.¹ In addition, the evaluation of the job duties of the proffered position provided by Dr. Advincula also added weight to the specialized nature of the job duties of the proffered position. In the instant petition, the petitioner appears to have met both the statutory requirements as outlined in the Act and the regulatory criteria as outlined in 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the beneficiary's qualifications for the proffered position, the petitioner submitted an educational evaluation from the International Credential Evaluators, Inc., Norman, Oklahoma. This document stated that the beneficiary's two degrees in restaurant business and in hotel and restaurant business from the Academy of Bordeaux, in Bordeaux, France, were the equivalent of a baccalaureate degree in hotel and restaurant management from an accredited university in the United States. Accordingly, the petitioner has established that the beneficiary is qualified to perform the duties of the proffered position.

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.

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).