

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



NOV 19 2003

File: SRC 01 191 54272 Office: TEXAS SERVICE CENTER 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, Texas Service Center, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a Chinese restaurant with 90 employees and a gross annual income of \$2,093,248. It seeks to temporarily employ the beneficiary as a food service 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, counsel asserts that evidence previously submitted to the record established that the position was a specialty occupation. In addition, counsel submits new documentation.

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 Texas Service Center on May 31, 2001, the petitioner described the duties of the proffered position as follows:

[The beneficiary] will supervise the kitchen and the dining room, oversee food preparation and cooking, examine food and service quality and portion size to ensure that dishes are prepared and garnished correctly and in a timely manner. Specifically, his responsibilities mainly include the following:

- o Lead the effort with [c]ompany's culinary team to create and develop authentic[ally] flavored Chinese food recipes and menu strategies, and design and implement them for our customers.
- o Direct cooks to develop and design new menus and create diversified foods to meet customers' tastes.
- o Oversee meal service with special attention given to presentation, service, production and merchandising.
- o Adhere to [c]ompany's purchasing policies, check[ing] invoices, bulk orders, [and] maintain[ing] proper inventories for food, supplies and equipment.
- o Handle the work of food and restaurant equipment supply, ordering, [and] using seasonal products, [recognizing] food trends and incorporating them into menu concept development.
- o Interact with customers and chefs and cooks [for] special event[s] to provide custom[ized] menus and services as required.
- o Maintain food cost[s], inventory controls and work within financial targets as specified by [g]eneral [m]anager. Interact with executive chefs on food

set-ups and displays to ensure the highest quality of food production, standards, presentation and techniques.

- o Maintain the highest levels of sanitation and cleanliness in all production areas.
- o Investigate and resolve customers' complain[t]s about food and service quality.
- o Monitor the actions of restaurant's employees and patrons on a continual basis to ensure [that] the health and safety standards and liquor regulations are obeyed.

The petitioner stated it had operated its restaurant in El Paso, Texas, since 1994 and submitted documentation to show that it had been named the best oriental restaurant in El Paso, Texas in 1999 in an *El Paso Times* reader's restaurant survey.

On August 14, 2001, the director asked for further information with regard to whether the proffered position was a specialty occupation by stating the following: "Please state why someone without the educational equivalent of a baccalaureate degree in restaurant management would be absolutely incapable of working for you in the proffered job. Be specific."

In response, the petitioner stated that it was difficult to answer the director's question, which was posed in the negative. The petitioner stated that competition in the restaurant and food service industry was intense and good management was of critical importance to the restaurant's existence. With regard to its operations, the petitioner stated it had 90 employees and provided more than 190 kinds of Chinese specialty foods, wines, and beer to its customers. The petitioner stated that, based on the complicated and sophisticated duties of the food service manager position, the position required an individual with a baccalaureate degree or its equivalent.

The petitioner also cited to the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* 2000-2002 edition and to the DOL's *Dictionary of Occupational Titles (DOT)* job classifications. In addition, the petitioner submitted a letter from Mr. [REDACTED] Chairman, American Chinese Restaurant Association, Los Angeles, California. The petitioner also stated that it had hired its previous food service manager through the H-1B petition process, and submitted for the record an H-1B approval notice and Certified Labor Condition Application (LCA) for Hoi Shan Leung. The petitioner submitted thirteen job vacancy announcements for directors of food and beverage services that were taken off of the Internet website ChefJobsNetwork.com. Finally the petitioner submitted excerpts from the catalogs of ten U.S. colleges or universities that had bachelor of science degrees in culinary arts, food and restaurant service management.

On December 6, 2001, the director denied the petition. The director determined that the proffered position was analogous to a general managerial and executive position as described in the 2000-2001 edition of the *Handbook*. The director noted that the *Handbook* stated that a baccalaureate degree, particularly in a focused, job-related field, was not usually needed for most general managerial and executive positions. With regard to the job vacancy announcements that the petitioner submitted, the director stated that many of these announcements did not specify a particular area of study. The director also stated that the announcements that did specify a particular area of study often required a degree in a non-culinary field. The director also determined that none of the jobs appeared to be positions similar to those found at a moderately sized Chinese restaurant. Finally the director cited to *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966) and stated that a position can not be said to be a specialty occupation if the only reason for requiring a baccalaureate degree is to acquire a higher caliber of employee.

On appeal, counsel states that the *Handbook* classification of general manager is not applicable to the instant petition, and refers to the *Handbook* classification of food service manager. Counsel draws attention to the *Handbook* statement that "a bachelor's degree in restaurant and food service management provides a particularly strong preparation for a career in this occupation." Counsel asserts that this statement demonstrates the market demand for bachelor degrees in the restaurant and food service industry.

Counsel asserts that, contrary to the director's decision, the job vacancy announcements submitted for the record did identify specific baccalaureate degrees. Counsel also asserts that the director's comment on the moderate size of the petitioner's business has no legal basis.

Counsel resubmits excerpts of the *Handbook* and the *DOT*, and submits, for the first time, the following documents:

- o A letter from [REDACTED] resident, Texas Restaurant Association, El Paso Chapter. This letter states that a food service manager not only should have the knowledge of culinary arts, food planning and preparation and cooking theory, but also should have the knowledge of business management, marketing, accounting, economics, statistics, sociology, human psychology and behavior. [REDACTED] also stated: "for those restaurants which promote their experienced chefs and cooks to the food service manager positions, they either give them the on-the-job training of the necessary theoretical knowledge or send them to take special courses or seminars to learn these knowledge [sic] and skills."
- o A letter from [REDACTED] M. A., Director, International Credentials, Johnson and Wales University. Ms [REDACTED] states in

her expert opinion letter that the position of food service manager, as described by the petitioner, is an occupation for which a bachelor degree in food service management would normally be required.

- o A letter from [REDACTED] General Manager [REDACTED] Mexican Food and Steaks. This letter states that for many years, the restaurant had employed Mr [REDACTED] who had the equivalent of a bachelor degree in restaurant and food service management.
- o A letter from [REDACTED] Seafood Restaurants, Inc., El Paso, Texas. This letter states that the restaurant had employed a food service manager with a bachelor degree since 1995. Mr [REDACTED] also states that [REDACTED] who graduated from the University of Texas at El Paso, was the restaurant's present food service manager.
- o A letter from [REDACTED] Dietary Director, Vista Hills Health Care Center. This letter states that the center had hired a food service manager with a bachelor's degree in food service management for its restaurant facility.

Counsel also asserts that the director's reasoning was erroneous with regard to her comments on the need for the proffered position to absolutely require the service of an individual with a baccalaureate degree in a specific specialty. Counsel states that such an absolute standard has no legal basis, since the regulatory criteria only use words such as normally, commonly and usually. Finally, counsel examines the decision made in *Matter of Shin*, which the director relied on to deny the petition. Counsel asserts that the holding and reasoning of *Matter of Shin* actually serves to broaden the spectrum of specialty occupations rather than to narrow it.

Upon review of the record, 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 considered a persuasive source of information regarding whether a particular job 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.

The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The Department of Labor's *Occupational Outlook Handbook (Handbook)* 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 that

occupation. For this reason, Citizenship and Immigration Services (CIS) is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT* or has designated the position to be in a specific job zone in the newer Standard Occupational Classification (SOC) coding system.

The petitioner has not articulated a sufficient basis for classifying the proffered position as a specialty occupation. In evaluating whether the proffered position is a specialty occupation, each of the four criteria listed at 8 C.F.R. § 214.2(h)(4)(iii)(A) will be considered separately below.

Upon review of the record, counsel correctly identifies the proffered position as that of food service manager. Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), namely that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the proffered position, the Department of Labor's *Occupational Outlook Handbook*, (*Handbook*) 2002-2003 edition, examines the position and educational requirements for food service managers on page 55 and states the following:

The daily responsibilities of many food service managers can often be as complicated as some of the meals prepared by a fine chef. In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently, and achieving quality in food preparation and service, managers now are responsible for a growing number of administrative and human resource tasks.

With regard to training, and other qualifications for the food service manager position, the *Handbook* states on page 56:

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.

. . . .

A bachelor's degree in restaurant and food service management provides a particularly strong preparation for a career in this occupation. . . For those not interested in pursuing a 4-year degree, community and junior colleges, technical institutes, and other

institutions offer programs in these fields leading to an associate degree or other formal certification.

Although the *Handbook* does not specifically address the hiring practices of specialty restaurants similar to the petitioner, it does establish that a four-year baccalaureate degree in a specific specialty is not the minimum educational requirement for entry into the food service manager field. Employers appear to hire both graduates with a specific restaurant management degree as well as graduates with degrees in other academic disciplines. To the extent that a baccalaureate or higher degree or its equivalent in a specific specialty is not required for entry into the field, the petitioner has not established the first criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A).

With regard to the second criterion of 8 C.F.R. § 214.2 (h) (4) (iii) (A), CIS often considers factors such as whether the Department of Labor's (DOL) *Occupational Outlook Handbook* (*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)).

With regard to establishing the industry standard, the petitioner submitted thirteen job vacancy announcements for directors of food and beverage. Contrary to the director's determination, twelve of these vacancy announcements require a baccalaureate degree in either food management or a closely related field. A more material fact in this proceeding is the fact that the positions in these vacancy announcements in many instances do not appear to be parallel positions in similar firms. For example, one vacancy announcement is for a chef and two others are for positions described as "R and D Manager" in batter and breading and savory specialties. These three positions do not appear at all relevant to the proffered position.

Other vacancy announcements have some overlap with the duties of the proffered position, but are not necessarily parallel positions. For example, the vacancy announcement for the position of manager for a Vicksburg, Mississippi facility identifies duties of developing and managing the business plan and budget for the restaurant. The third vacancy announcement for a director of food and beverage in a casino in Toppenish, Washington, includes the duties of instituting a program of ongoing training and development of staff, and being responsible for the hiring, training, supervision and evaluation of all food service, kitchen, and bar personnel. These duties are also not similar to those described for the proffered position.

Finally, some businesses who advertised for food and beverage managers, do not appear to have the same kind of business as the

petitioner. For example, the second job vacancy announcement is for a director of food and beverage in Reno, Nevada business, who is responsible for a 24-hour 200-seat restaurant, snack bar, employee dining, casino lounge and all beverage service. Another vacancy announcement is for a chef/manager in an in-flight kitchen facility serving five customers with 12,000 meals served daily. In sum, the record is not clear as to which, if any, positions listed in the vacancy announcements are parallel to the proffered position and which businesses are similar to the petitioner in terms of the nature of their business operations. Without more persuasive evidence, the petitioner has not established that similar firms with parallel positions in the restaurant industry commonly hire food service managers with baccalaureate degrees in specific specialties.

In addition, the petitioner also submitted letters from two other restaurants in the El Paso area in addition to a letter from an El Paso health care facility with a restaurant facility. Although all three letter writers stated that they had hired individuals with bachelor degrees, none of the letter writers provided any corroborative evidence to establish that their employees had baccalaureate degrees in a specific specialty, such as food service or restaurant management. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without more persuasive evidence, the petitioner has not established that the degree requirement is common to the industry in parallel positions among similar organizations.

B. Complexity and Uniqueness of the Proffered Position

In the alternative, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. In the instant petition, the petitioner submitted its menu and newspapers articles that are primarily food reviews. On appeal, counsel notes that the petitioner has two restaurants, with the second one employing 45 employees. While the newspaper food reviews document that the food served by the petitioner is rated as among "the best of its format," the documentation submitted to date does not establish that the proffered position is either complex or unique.

III. **The employer normally requires a degree or its equivalent for the position - 8 C.F.R. § 214.2(h)(4)(iii)(A)(3)**

Although the petitioner submitted documentation of another individual who was granted an H-1B visa, it provided no further documentation that the petitioner employed this individual as its food service manager, or that the individual was qualified to perform the duties of food service manager. It is, therefore, not possible to determine definitely whether this petition was properly approved or approved in error. CIS is not required to approve applications or petitions where eligibility has not been

demonstrated. Furthermore, the Administrative Appeals Office, is not bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Although counsel notes on appeal that the petitioner has two restaurants, the record is devoid of documentation on whether the petitioner has hired a food service manager at the second restaurant and the academic credentials of any such employee. Without more persuasive evidence, the petitioner has not established this criterion.

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

On appeal, counsel asserts that the duties of the proffered position are "the same as, similar to, and even more complicated in some part" than the duties of the positions described in the thirteen vacancy announcements submitted by the petitioner. As stated previously, some of these positions are not found to be relevant to the duties of the proffered position or to the nature of the petitioner's business.

Based on the menu and news articles submitted by the petitioner, it has two Chinese restaurants in El Paso, Texas, and one of them serves a super Chinese buffet with some 100 food dishes. The petitioner's a la carte menu features an extensive list of traditional Chinese dishes along with some American specialties such as hamburgers and apple pie a la mode. Although the menu indicates a large quantity of Chinese food dishes, it does not necessarily document the complex or specialized nature of the business operation.

In addition, although the newspaper articles and food reviews document the opinions of food editors as to the quality of the cooking, they do not establish the complicated or specialized nature of the duties of the proffered position. Information such as the number of cooks to be supervised, the complexity of any particular food dishes, the difficulty of obtaining ingredients for food dishes, or the volume of special catering events, would provide more probative weight to the proceedings. Without more persuasive evidence as to the specialized or complex nature of the position, the petitioner has not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The petitioner has failed to establish that any of the four criteria 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.

Beyond the decision of the director, the evidence on the record is not persuasive that the beneficiary is qualified to perform the duties of the proffered position. The record does not contain an evaluation of the beneficiary's educational background in combination with his employment experience, from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience, as required by 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

The petitioner submitted an educational equivalency document from the Foundation for International Services, Inc., in Bothell, Washington, that evaluated the beneficiary's four year program of university studies in English, his two year program of university studies in Business Management, and the beneficiary's eleven years of work experience in China in the field of restaurant and food management. The Foundation determined that the beneficiary had the equivalent of a bachelor's degree in foreign language (English) and a bachelor's degree in business management from an accredited U.S. university or college. Based on the beneficiary's employment experiences, the Foundation also determined that the beneficiary had an educational background equivalent to an individual with a bachelor's degree in restaurant management from an accredited U.S. college or university.

There is no indication on the record that the Foundation for International Services has the authority to grant college level credit for the beneficiary's work experience. In addition, neither the beneficiary's resume nor the letter from the beneficiary's Chinese employer at the Wuhan People's Hotel contains sufficient information to meet the criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(D)(5). As this matter will be dismissed on the grounds discussed, this issue need not be examined 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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.