



U.S. Citizenship  
and Immigration  
Services

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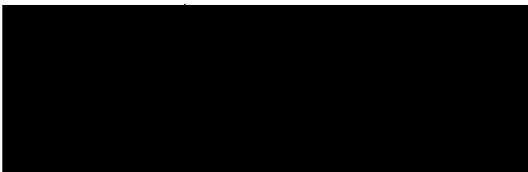


FILE: SRC 02 162 51885 Office: TEXAS SERVICE CENTER Date: **AUG 03 2004**

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

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 of the Administrative Appeals Office 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.

*Mari Johnson*

to Robert P. Wiemann, Director  
Administrative Appeals Office

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prevent clearly unwarranted  
invasion of personal privacy**

**DISCUSSION:** The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a restaurant that seeks to employ the beneficiary as a *sous* chef. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief.

Section 214(i)(1) of 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.

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.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a *sous* chef. Evidence of the beneficiary's duties includes: the Form I-129; the March 31, 2002 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail supervising and instructing cooking and kitchen personnel; assisting the executive chef in developing new menus and testing new dishes; carving meats and preparing dishes; assuming responsibility for the kitchen in the executive chef's absence; and handling catering and serving as pastry chef. The petitioner stated that a candidate must have formal training as a chef and a pastry chef, and have eight years of experience that includes training others.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). After referencing the Department of Labor's (DOL) *Dictionary of Occupational Titles (DOT)* and the *Occupational Outlook Handbook (the Handbook)*, the director stated that the proffered position does not require a baccalaureate or higher degree as the minimum requirement for entry into the *sous* chef position. Furthermore, the director stated that the submitted evidence failed to establish that the position requires a bachelor's degree. The director mentioned that the mere requirement of a college degree for the sake of general education or to obtain what the employer perceives as a higher caliber employee also does not establish eligibility as a specialty occupation.

On appeal, counsel states that the proffered position is a specialty occupation and that in the director did not consider all of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria 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." See *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)).

In the appeal brief counsel discusses the evolution of the term "specialty occupation" and states that CIS must now evaluate the responsibilities, duties, tasks, demands, and requirements of a position to determine whether it is a specialty occupation. In determining whether a position qualifies as a specialty occupation, CIS does look beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act.

Relying on the case of *Tapis Int'l vs. INS*, 94 F.Supp. 2d 172 (D. Mass. 2000), counsel contends that the language “or its equivalent” in the Act and regulations enables an occupation to qualify as a specialty occupation based on education, experience, or a combination of the two. Counsel maintains that by ignoring this language, the director precludes any position from satisfying the specialty occupation requirements where a specific degree is not available in that field. Counsel contends that the director’s reasoning about the SVP level in the *DOT* and the degree requirement for the proffered position disregarded the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(D) which specifically provides “work experience equivalent to a bachelor’s degree may qualify an alien as a specialist.”

Counsel’s contention about education equivalency is weak. Educational equivalency is considered by CIS when a specific degree does not exist in an occupational field. *Tapis Int'l, id.* The *Handbook* mentions that many years of training are necessary for the occupation of a chef; most important, it also reports that there are formal degree programs specifically designed for the occupation of chef. Consequently, CIS need not consider educational equivalency for the proffered position. In addition, the issue in this proceeding is about whether the *proffered position* qualifies as a specialty occupation; it is not about whether work experience equivalent to a bachelor’s degree qualifies the beneficiary as a specialist.

Another of counsel’s contentions is that the petitioner “need not fulfill the baccalaureate degree requirement if it can demonstrate that the position meets other criteria enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A).” Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) which defines the term “specialty occupation” and 8 C.F.R. § 214.2(h)(4)(iii)(A) which defines how to qualify a position as a specialty occupation do not support counsel’s contention. A bachelor’s or higher degree in the specific specialty (or its equivalent) is required by the Act and regulations to qualify a position as a specialty occupation. Once again, educational equivalency does not apply to this case. Thus, the petitioner must establish a specific degree requirement for the proffered position to qualify as a specialty occupation.

Although the director cited the *DOT* in his denial letter, 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 DOL 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 *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within an occupation. For this reason, the AAO routinely consults the *Handbook*.

Upon a review of the *Handbook*, the duties of proffered position are performed by chefs, occupations that do not require a bachelor’s degree. The *Handbook* states that chefs are responsible for directing the work of other kitchen workers, estimating food requirements, ordering food supplies, and creating recipes and preparing meals, and that a *sous chef* is the second-in-command and runs the kitchen in the absence of the executive chef.

According to the *Handbook*, executive chefs who work in fine restaurants require many years of training and experience. Some chefs start their training in high school or post-high school vocational programs. Others receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. In addition, some large hotels and restaurants operate their own training and job-placement programs for chefs and cooks. Most formal training programs require some form of apprenticeship, internship, or out placement program that are jointly offered by the school and affiliated restaurants. Professional culinary institutes, industry associations, and trade unions also sponsor apprenticeship programs in coordination with the U.S. Department of Labor. Many chefs are trained on the job. The *Handbook* explains that some vocational programs in high schools may offer training, but employers usually prefer training given by trade schools, vocational centers, colleges, professional associations, or trade unions. Postsecondary courses range from a few months to 2 years or more. Degree-granting programs are open only to high school graduates. The number of formal and informal culinary training programs continues to increase to meet demand. Formal programs, which may offer training leading to a certificate or a 2- or 4-year degree, are geared more for training chefs for fine-dining or upscale restaurants.

Based on this information, the *Handbook* unequivocally explains that a bachelor's degree is not required for a chef position. Accordingly, a bachelor's degree or its equivalent in a specific specialty is not the normal minimum requirement for entry into the proffered position.

Referring to the cases of *Globenet, Inc. v. Attorney General*, 1989 WL 132041 at \* 2 (D.D.C. 1989) and *Hong Kong T.V. Video Program Inc. v. Ilchert*, 685 F. Supp. 712, 716 (N.D. Cal 1988), counsel contends that a profession or specialty occupation does not have an absolute degree requirement. According to counsel a specific degree requirement is an important factor in determining whether an occupation is a profession or specialty occupation, but the Act and CIS precedent do not indicate it is an absolute test. To determine whether an occupation qualifies as a specialty occupation, counsel states that CIS often examines whether the position requires specialized study, coupled with whether it has complex and discretionary duties normally associated with professional jobs. To support this statement counsel cites three cases including *Matter of Sun*, 12 I&N Dec. 535 (1967). Counsel states that in *Matter of Sun* the occupation of hotel manager was a professional position because of its complex job duties, even though there was no suggestion that a degree was a prerequisite for the position.

This contention that a profession or specialty occupation does not need an absolute degree requirement misinterprets the language in *Globenet, Inc.* and *Hong Kong T.V. Video*. In these cases, the federal court and the Immigration and Naturalization Service (INS), now CIS, stated that a degree is not necessary for an alien to qualify to perform services in a specialty occupation; what is necessary is education and knowledge equal to a baccalaureate level of education. This statement speaks to whether an alien beneficiary is qualified to perform services in a specialty occupation. It does address whether *a position* qualifies as a specialty occupation. To qualify as a specialty occupation, the Act plainly states that a position must require theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. Again, the language "or its equivalent" does not apply in the instant case.

Courts have stated that determining whether an occupation qualifies as a specialty occupation involves examining “whether there is a general requirement of specialized study for the post, coupled with whether the position has complex and discretionary duties normally associated with professional posts.” *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Augat, Inc. v. Tabor*, 719 F.Supp. 1158, 1161 (D.Mass. 1989) which cites *Matter of Perez*, 13 I&N Dec. 701, 702; *Mindsey v. Illchert*, No. C-84-6199-SC (N.D.Cal. Dec. 11, 1987); *Matter of Sun, id*). As described in the *Handbook*, the duties of the proffered position are performed by a chef. Employers do not require specialized study for a chef position. Some chefs start their training in high school or post-high school vocational programs while others receive formal training through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs in hospitality or culinary arts. Furthermore, the proffered position does not have complex and discretionary duties normally associated with professional posts; the DOL does not describe a chef as a professional post. Consequently, the proffered position fails to qualify as a specialty occupation.

The second criterion requires that the petitioner establish that a degree requirement is common to the industry in parallel positions among similar organizations. The evidence in the record is as follows: (1) the petitioner’s menu; (2) an opinion letter from the director of the Culinary Arts Program of the Art Institute of Fort Lauderdale; (3) a document entitled “Creative Careers: Real Jobs in Glamour Fields”; (4) several pages from the publication *Restaurant Hospitality*; and (5) evidence about the American Culinary Federation, Inc., a nonprofit organization for chefs.

This evidence is unpersuasive in establishing the second criterion. The petitioner’s menu merely described the restaurant’s fare; it has no value in establishing a degree requirement. Nowhere in the letter from the director of the Culinary Arts Program does the director state that a *sous* chef requires a specific baccalaureate degree; the director simply stated that a successful *sous* chef would have received training and education from a reputable culinary school and would have held progressively responsible positions in a kitchen, a process that normally takes five to eight years. The publication *Restaurant Hospitality* discussed the need to operate an efficient kitchen; it does not mention a degree requirement. The document “Creative Careers: Real Jobs in Glamour Fields” and the evidence from the American Culinary Federation, Inc. discussed certification levels and point requirements. For example, the Creative Careers document stated that the 20 education points, 20 experience points, and 4 association points required to become a certified cook translate into a college education and several years of experience. The *Handbook* does mention that chefs may compete and test for certification as master chefs; however, the *Handbook* reports that employers do not require certification to enter the field. It can be a measure of accomplishment and lead to further advancement and higher-paying positions. Furthermore, the *Handbook* states that the American Culinary Federation, Inc. certifies pastry professionals and culinary educators in addition to various levels of chefs. Certification standards are based primarily on experience and formal training. Therefore, the *Handbook* reveals that certification does not require a bachelor’s degree. Instead, it is based on experience and formal training such as through independent cooking schools, professional culinary institutes, or 2- or 4-year college degree programs. In summary, the submitted evidence fails to establish a specific baccalaureate degree requirement in the industry.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner claimed that its two chefs are graduates of culinary institutes and that they have extensive training and experience. One chef, the petitioner stated, attained the level of *sous* chef. The record contains the resumes of the two chefs. One resume indicated that the employee holds an associate degree; the other resume stated that the employee had graduated from the Virginia Culinary Institute after attending it from 1988 to 1992, though it did not indicate that the employee was granted a bachelor's degree in the culinary field. Consequently, the evidence fail to establish that the petitioner normally requires a specific bachelor's degree.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* plainly shows that the beneficiary's duties mirror those of a chef, a position that the *Handbook* evinces does not require a bachelor's degree. Thus, the petitioner fails to establish the fourth criterion.

The AAO wishes to note that in counsel's response to the request for evidence, she stated that the Fair Labor Standards Act (FLSA) provides a framework for evaluating the professional status of a position. The FLSA is irrelevant in determining whether a position qualifies as a specialty occupation based on the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). The FLSA deals with wage and hour laws; this is not pertinent to the issue of whether a position qualifies as a specialty occupation under the Act.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. 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.